# United States Court of Appeals for the Second Circuit



**APPENDIX** 

# **United States Court of Appeals** For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO GERBASIO,

Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

APPELLANT'S APPENDIX

MICHAEL S. WASHOR Attorney for Defendant-Appellant 16 Court Street Brooklyn, N.Y. 11241 (212) TR 5-1292

UNITED STATES ATTORNEY Eastern District of New York Attorney for Appellee 225 Cadman Plaza East Brooklyn, N.Y. 11201 (212) 596-3059



PAGINATION AS IN ORIGINAL COPY

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INDICTMENT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MARIO J. DELUCIA and ANGELO GERBASIO,

75 CR 965 Cr, No. 75 CR 965 (T. 18, U.S.C., Section 659, Section 371 and Section 2)

Defendants

- - X

THE GRAND JURY CHARGES:

#### COUNT ONE

On or about the 23rd day of October 1975, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO, with intent to convert to their own use, did wilfully and knowingly embezzle, steal and unlawfully take from Cargo Building 67, John F. Kennedy International Airport, Queens, New York, a quantity of women's coats, having a value in excess of One Hundred Dollars (\$100.00), which goods were moving as and constituting a foreign shipment of freight from Taiwan, Republic of China to New York, New York. (Title 18, United States Code, Sections 659 and 2).

#### COUNT TWO

On or about and between the 20th day of October 1975, and the 23rd day of October 1975, both dates being approximate and inclusive, within the Eastern District of New York, the

#### INDICTMENT

defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO, did know! Ly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Section 659, by conspiring to unlawfully take from Cargo Building 67, John F. Kennedy International Airport, Queens, New York, a quantity of women's coats, having a value in excess of One Hundred Dollars (\$107.00) which goods were moving as and constituting a foreign shipment of freight from Taiwan, Republic of China, to New York, New York, and further, to unlawfully receive and have in their possession the said coats, the aforesaid defendants knowing the same to have been stolen.

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO committed, among others, the following:

#### OVERT ACT

On or about October 23, 1975, within the Eastern District of New York, the defendant MARIO J. DELUCIA and the defendant ANGELO GERBASIO traveled together, in a motor truck from John F. Kennedy International Airport, Queens, New York, to Staten Island, New York. (Title 18, United States Code, Section 371).

A TRUE BILL.

UNITED STATES ATTORNEY EASTERN DISTRICT OF N.Y.

s/Cathy F. DeVito Foreman

#### REQUEST NO. 1

The mere association between ANGELO GERBASIO and the co-defendant is not proof of participation in a conspiracy and there are no presumptions or inferences of guilt that arise from mere association.

U.S. v. MOLONY, 200 F. 2d 344 EVANS v. U.S., 257 F. 2d 121; CAUSEY v. U.S., 352 F. 2d 203; U. S. v. KOMPINSKI, 373 F.2d 429.

#### REQUEST NO. 2

Where the Government fails to establish that ANGELO GERBASIO was to receive some benefit relative to the alleged conspiracy then mere knowledge, acquiescence, and indifference will be insufficient to connect the accused with the conspiracy charge.

EGAN v. U.S., 137 F. 2d 369

The mere acquiescence by ANGELO GERBASIO coupled with his presence does not impose criminal conspiratorial responsibility upon him.

U.S. v. AMERICAN: 115 F. Supp. 823

## REQUEST NO. 3

Mere knowledge of the co-defendant's illegal actions is insufficient to make ANGELO GERBASIO a co-conspirator.

TURCOTTI v. U.S. 21 F. 2d 829

#### REQUEST NO. 4

A person's stake in an alleged conspiracy is a relative factor to consider in determining whether he participated therein. You may consider the lack of ANGELO GERBASIO's financial stake in determining his guilt or innocence. If you find that ANGELO GERBASIO had no stake and no financial interest in the success of the conspiracy, then you must find he was not a party to it.

DIRECT SALES, et al, v. U.S. 319 U.S. 703 U.S. v. DI RE, 159 F. 2d 818

#### REQUEST NO. 5

If ANGELO GERBASIO had knowledge, approval of, or acquiescence in the object or purpose of the conspiracy herein, without an intention and agreement to cooperate in the crime, then the jury must find that he was a non-conspirator.

CLEAVER v. U.S., 328 F. 2d 766; DENNIS v. U.S., 302 F. 2d 3; LUCADAMO v. U.S. 280 F. 653.

Knowledge by ANGELO GERBASIO that the co-defendant was attempting to violate the law is not sufficient to involve him in a conspiracy.

MARRASH v. U.S. 188, F. 225;

#### REQUEST NO. 6

Even if ANGELO GERBASIO committed an overt act, he did not violate the law of conspiracy if he did not join in

the illegal agreement; If the jury is satisfied that ANGELO GERBASIO had no part of the illegal transactions, then they must find him not guilty.

MARINO v. U.S., 91 F. 2d 691

If the jury merely suspects the participation of ANGELO GERBASIO in the conspiracy, said suspicion is inadequate to sustain a conviction therefor.

U.S. v. NARDIELLO, 303 F. 2d 876

#### REQUEST NO. 7

The jury must consider the state of mind of ANGELO GERBASIO in determining if there were criminal intent on his part to be a rember of the conspiracy and to commit a crime.

where the Government failed to establish a mutual understanding to commit an unlawful act between ANGELO GERBASIO and the co-defendant, then they must acquit ANGELO GERBASIO of the crime of consp. acy. Where the Government fails to show that ANGELO GERBASIO was a willful participant with the intent to accomplish the goal of a conspiracy, then the jury must find him not guilty.

STATEMENT OF GERBASIO 20 MINUTES AFTER ARREST UNREDACTED

#### FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/28/75

1

ANGELO GERBASIO read his rights as they appear on a "Waiver of Rights" form. He stated that he understood his rights and signed this form.

GERBASIO stated that on the morning of October 23, 1975, he came to work about 7:15 AM and about 8:00 AM asked him to help on a truck, that had a heavy load.

ANGELO stated that he had no idea where he was going and did not know the truck contained any freight. ANGELO stated there was some conversation in the truck and he believed that he was going for a pick up at some pier in Staten Island.

ANGELO stated he could not furnish any further information:

The following background information was obtained from observation and interview:

Name
Date of Birth
Place of Birth
Height
Weight
Hair
Eyes
Military

Marital Statue Wife Children ANGELO GERBASIO
December 17, 1944
Brooklyn, New York
Five feet, seven inches tall
205 pounds
Brown
Brown
United States Army 1963 to 1965

Serial Number US# 51518155
Honorable Discharge
Married
JACQUELINE
Two boys - ages 7 and 4

STATEMENT OF GERBASIO 20 MINUTES AFTER ARREST UNREDACTED

Inter viewed on 10/23/75 at Kennedy Airport, New York, File #15 by SA FRANCIS R. JULES and SA WALTER F. YOOS; jmw Drite dictated 10/24/75

Social Security Account Number Residence

Telephone Number Employment 061-34-2128
245-22 149th Road
Rosedale, New York
723-7105
Pan American Airlines
Eight Years
Truck Driver
Senior Steward

POST-CONSPIRACY HEARSAY STATEMENTS OF CO CONSPIRATOR IMPLICATING DEFENDANT - BRUTON

Defendants X, Y, and Z were jointly tried for conspiracy to obstruct justice and obstruction of justice in connection with the shooting of a povernment witness in a criminal investigation. At the trial, a prosecution witness testified, over defense objection, that two days after the shooting, defendant X had told him that he had shot the victim after being hired for that purpose by defendant Y. The declarant (defendant X) did not take the stand to testify in his own be at the trial court, concluding that the inculpatory statement had been made subsequent to the termination of the conspiracy, instructed the jury that such postconspiracy statements may be considered against any of the defendants present when the statement was made.

Held, in reversing the conviction, that Bruton v.
United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), had
expressly overruled Delli Paoli v. United States, 352 U.S. 232,
77 S. Ct. 294 (1957), the case relied upon by the trial court
in giving its instruction. Said the court:

"In Bruton, the Supreme Court held that because of the substantial risk that the jury, despite instructions to the contrary, may look to the incriminating extrajudicial statements in determining guilt of those other than the declarant, admission of such statements in a joint trial violates the right of cross-examination secured by the confrontation clause of the Sixth Amendment. 391 U.S. 123, 126, 88 St. Ct. 1620, 20 L.Ed. 2d 476.

POST-CONSPIRACY HEARSAY STATEMENTS OF CO CONSPIRATOR IMPLICATING DEFENDANT - BRUTON

"Such limiting instructions do not prevent or cure prejudice that results when statements that directly incriminate co defendants are introduced into evidence at a joint trial and the declarant is not available to testify or to be cross-examined." NOTICE OF MOTION DATED JANUARY 26, 1976

----X

SAME TITLE

- - - - - X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of MICHAEL S. WASHOR, ESQ., duly affirmed to the day of June, 1976, the indictment herein, and upon all the proceedings heretofore had herein, the undersigned will move this Court day of July, 1976, at the United States Courthouse, on the 225 C.dman Plaza East, Borough of Brooklyn, City and State of New York, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard before the Hon. John Dooling Jr. United States Listrict Judge, for an order directing the United States Attorney for the Eastern District of New York to furnish to the undersigned pursuant to Rule 7(f) F.R.C.P., a Bill of Particulars as set forth herein together with relief pursuant to Rule 16, F.R.C.P., allowing discovery and inspection to the extent herein after requested, together with such other and further relief as to this Court may seem just andproper.

Dated: Brooklyn, N.Y. January 26, 1976

TO: United States Attorney
Eastern District of N.Y.
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Yours, etc.

MICHAEL S. WASHOR
Attorney for Defendant
Office and P.O. Address
16 Court Street
Brooklyn, N.Y. 11241
(212) TR 5-1292

DEMAND FOR A BILL OF PARTICULARS

---- X

SAME TITLE

----X

The defendant, ANGELO GERBASIO, through his counsel, pursuant to Rule 7(f) and Rule 16, F.R.C.P., respectfully demands the following particulars and discovery and inspection:

#### A. DEMAND FOR A BILL OF PARTICULARS

#### As to Count I

- 1. State the exact time and place wherein the defendant allegedly stole and unlawfully took the "goods" forming the subject matter herein.
  - 2. State the value of the "goods" herein.

#### As to Count II

- 3. State the exact date, and reasonably approximate hours of the day or evening when it will be claimed at trial that the defendant ANGELO GERBASIO did knowingly conspire and agree to viclate Title 18, U.S.C. 659.
- 4. State where and when it will be claimed at trial that the defendant ANGELO GERBASIO did so conspire to violate Title 18, U.S.C. 659.
  - 5. State the content of said alleged illegal agreement.
  - 6. State the "goal" of said alleged illegal agreement.
- 7. State the benefit to have been received by said defendant, ANGELO GERBASIO.

#### DEMAND FOR BILL OF PARTICULARS

- 8. State the dates that the defendant ANGELO GERBASIO allegedly entered and terminated his participation in the alleged conspiracy.
- State the approximate date and place under Overt.
   Act No. 1.
- 10. State the scope and sphere and substance of the discussion allegedly had, under Overt Act No. 1.
- 11. State if any third party was present or privy to the discussion allegedly held under Overt Act No. 1.
- 12. For the names and addresses of any and all persons that were present or privy to any or all of the alleged incidents, described under Overt Act No. 1.
- Overt Acts that will be offered at the trial of the issues herein, not specifically enumerated in the within indictment.
- 14. For a list of all alleged co-conspirators known to the United States Attorney, under Count No. 11.
- which of the alleged co-conspirators were to have been indicted, arrested, convicted, acquitted, sentenced, those who have "made deals" with the Government; those who have received "legal benefits" by allegedly cooperating with the Government; and those to whom any "promises" or representations were to have been made by any Court or U.S. Attorney.

#### DEMAND FOR BILL OF PARTICULARS

#### B. DISCOVERY AND INSPECTION

- 1. Pursuant to Rule 16(a)(1) F.R.C.P., state whether any electrical or mechanical device was utilized, successfully or not, to record any conversation of the defendant, ANGELO GERBASIO, giving the type and description of the device used and the agency or agencies using the device (whether City, State or Federal) and/or
- 2. Pursuant to Rule 16(a)(1) F.R.C.P., state whether or not any authorization to use a recording device, referred to in par. 1 above, was ever obtained (Section 2516-2518, Title 18, U.S.C.), and if so, where, giving the full names and title of the person or persons authorizing it, and the statute or section relied upon as authority for its use.
  - 3. Pursuant to Rule 16(a)(1) F.R.C.P., furnish a transcript of any such recording referred to in part. 1 above, or permit counsel to copy same.
  - 4. Pursuant to Rule 16(a)(1) F.R.C.P., state whether there is any written or otherwise recorded statement made by (a) the defendant ANGELO GERBASIO, or (b) any co-conspirator whether contained in another person's report or statement of any other format, within the possession, custody or control of the Government, the existence of which is known to the attorney for the Government.
  - 5. Pursuant to the above, if the answer to par. 4 above, is in the affirmative, furnish copies of such reports,

statements, remarks, comments, whatever, attributed to (a) the defendant ANGELO GERBASIO, and (b) any co-conspirator, whether contained in another person's report or statement or in any other format, within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the Government.

- 6. Pursuant to Rule 16(a)(2) F.R.C.P., require the Government to furnish the results of any handwriting, finger-prints, voiceprint, photography or other scientific test or experiment that has been or will be conducted in connection with this particular case.
- 7. For copies of all B.C.I. and F.B.I. record sheets of any and all witnesses that will testify on behalf of the Government at the trial herein.
- 8. For copies of all pertinent material, not limited to, but including, indictments, arrest complaints, Government memoranda reflecting any witness' cooperation, dates, times and places of any pleas of guilty, trials, convictions, or acquittals, of any witnesses that are to be used by the Government at the trial herein.

#### C. EXCULPATORY RELIEF

Pursuant to the doctrine enunciated in Brady vs.

Maryland, 373 U.S. 83 (1973), disclose and where appropriate,

DEMAND FOR BILL OF PARTICULARS

.

furnish copies of, any and all statements, information, or other evidence of any kind or description which could be, or is exculpatory of the defendant's alleged guilt. In this regard, the United States Attorney should be directed to disclose:

- 1. The name or identity and the address of each and every person who has knowledge and information concerning the alleged offenses charged in this indictment.
- 2. The name, identity and address of each and every person who has exculpatory information which could be helpful to the defendant in the preparation of his defense to the charge of this indictment.
- 3. Every exculpatory fact, circumstance, lead or evidence which the United States Attorney may know or can determine from an examination of the various investigative agencies of the United States Government which might, may, or could assist him in the preparation of his defense.
  - D. THE DEFENDANT HEREBY REQUESTS A PRE-TRIAL HEARING TO TEST THE ADMISSIBILITY OF ANY ALLEGED STATEMENTS ATTRIBUTED TO SAID DEFENDANT.
  - E. THE DEFENDANT HEREIN REQUESTS A PRE-TRIAL SUPPRESSION HEARING PURSUANT TO RULE 41 (F), F.R.C.P.

SAME TITLE

----X

STATE OF NEW YORK )
SS:
COUNTY OF KINGS )

MICHAEL S. WASHOR, an attorney admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

That I am the attorney for the above-named defendant,

ANGELO GERBASIO, and make this affirmation in support of

the relief requested in the annexed notice of motion.

#### 1. AS TO A MOTION FOR A BILL OF PARTICULARS

It is respectfully pointed out to the Court that the particulars requested from the United States Attorney are necessary and essential in the preparation of the defense to the indictment at bar. Although the indictment, containing several counts therein, set forth the statutory language apprising the defendant of the charges pending against him, they are insufficient as a matter of law to enable the defendant to properly prepare his defense herein. Because of the numerous objects and wide latitude allowed the Government in the presentation of its proof, the defendant is at a distinct and prejudicial disadvantage unless he is advised with particularity of his particular participation in the crimes charged.

It is essential for the defendant to know with definiteness and accuracy the answers to each and all of the particulars requisted by him, to the end that they may fairly reach the allegations of the indictment. It is further essential and necessary, in the interests of Justice, to place the defendant in parity with the Government, so that the defendant be definitely informed by means of the answers to all of the particulars demanded, so that there will be no surprise at the trial, and that the trial will not be delayed due to a motion that the defendant might be compelled to make during the trial for a continuance to give him a fair opportunity to investigate and enable him to meet such testimony.

That the items sought by the defendant herein are both reasonable and fair, and do not place the Government in any position wherein they would be exposing evidentiary matter prior to the time of trial.

# 2. AS TO THE REQUESTS FOR A DISCOVERY AND INSPECTION

Rule 16a of the Federal Rules of Criminal Procedure permit the Courts to grant the defendant's application for a discovery and inspection of any written or recorded statements or confessions made by the defendant.

It is submitted that the Court should exercise its discretion in the instant case, so that the defendant may

properly ascertain the merits of his defense within the purvue of any and all statements made by him at or about the time of the alleged commission of the crimes charged.

Rule 16e of the Federal Rules of Criminal Procedure permits the Courts to grant the defendant's application for a discovery and inspection of all witnesses to be proferred by the Government at the trial herein.

It is submitted that the Court should exercise its discretion in this instance so that the accused may properly investigate and ascertain the merits of any and all motions to be made en futuro.

#### 3. AS TO THE DEMAND FOR A PRE-TRIAL SUPPRESSION HEARING

At or about the time of the defendant's arrest herein, upon information and belief, the source of said information eminating from confidential communications with the defendant, the arresting authorities possessed neither an arrest warrant nor a search warrant for the defendant or the truck wherein the defendant was a passenger.

It is alleged that the defendant ANGELO GERBASIO arrived at work at 7:30 a.m., was directed to accompany the co-defendant MARIO DELUCIA as a "helper" to a pier in Staten Island for a delivery of goods, within the scope of his employment.

That thereafter, while in route, said truck was stopped by the authorities; the defendant and co-defendant were arrested, the truck searched and certain goods were seized forming the basis of the within indictment.

At no time did the defendant waive any of his constitutional rights nor did he consent to the search herein.

It is respectfully submitted that the defendant is entitled to a hearing to determine the validity of the arrest herein, as well as the legal permissibility of the search and seizure made herein.

Dated: Brooklyn, New York January 26, 1975

MICHAEL S. WASHOR

NOTICE OF MOTION DATED JUNE 28th, 1976

SAME TITLE

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of MICHAEL S. WASHOR, ESQ., duly affirmed to the 28th day of June, 1976, he indictment herein, and upon all the proceedings heretofore had herein, the undersigned will move this Court on the 8th day of July, 1976, at the United States Courthouse, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard before the Hon. John Dooling Jr., United States District Judge, for a judgment of acquittal pursuant to Rule 29, subdivision (c) of the Federal Rules of Criminal Procedure, together with such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York June 28th, 1976

Yours, etc.

TO: UNITED STATES ATTORNEY Eastern District of N.Y. Attorney for Defendant 225 Cadman Plaza East Brooklyn, N.Y. 11201

MICHAEL S. WASHOR Office and P.O. Address 16 Court Street Brooklyn, N.Y. 1241 (212) TR 5-1292

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SAME TITLE

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STATE OF NEW YORK )

COUNTY OF KINGS

MICHAEL S. WASHOR, an attorney admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

That I am the attorney for the above named defendant, ANGELO GERMASIO, and make this affirmation in support of the relief requested in the annexed notice of motion.

On May 11, 1976, the jury herein returned a vereict of guilty on both counts of the within indictment as against the defendant, ANGELO GERBASIO, as well as the co-defendant. Upon application of your deponent, the right to make the within motions was reserved.

only in a recapitulation of the trial testimony and the respective points of law decided by the Court prior to the submission of the case to the jury.

# RECAPITULATION OF TRIAL TESTIMONY

JOSEPH SIMON, an employee of Pan American, working in the cargo area, was approached by DELUCIA and importuned to commit a crime, on October 17, 1975; the gist of the solicitation was to have SIMON move some cargo the the loading

platform on the forthcoming Wednesday, October 23, 1975; it was further explained by DELUCIA that he would have a third party help him and that third party shall remain nameless for protection purposes.

SIMON then went and reported the incident to Mr. Godoy.

On October 23, 1975, at or about 2:30 a.m. SIMON

moved two carts from the warehouse to the loading platform

and watched DELUCIA, alone, load the truck. He reported

the loading to Mr. Godoy.

Mr. Godoy testified that he received the report as aforesaid from Mr. Simon; that on October 21st, 1975, he reported the incident to his superior, who in turn contacted the F.B.I. On October 21, 1975, a meeting was had between Agent Jules, Mr. Pariello of Pan American, his superior, and Mr. Godoy. Arrangements were made for surveillance of Cargo Building No. 67 and telephonic communication of the same area for October 23, 1975.

F.B.I. Agent Welsh, on October 23, 1975 headed the command post and was in electronic communication with Mr. Codoy and the several F.B.I. agents making the surveillance of the cargo area.

Agent Westhoff and Agent Yoos observed DELUCIA on October 23, 1975 at or about 2:30 A.M. load the truck in question, by himself, and move said truck to the south side of the Pan American Building. All agents were advised

telephonically of these surveillances.

At or about 8:00 A.M. on said date DELUCIA and GERBASIO were seen to enter the truck, DELUCIA being the driver and GERBASIO, the passenger. GERBASIO gassed the truck. Thereafter the truck left Pan American cargo area and proceeded through Queens and Brooklyn over the Verrazano Bridge into the streets of Staten Island, using somewhat evasive driving tactics.

The six (6) F.B.I. agents thereafter pulled the truck to the side, alighted from their automobiles and arrested both defendants. GERBASIO was questioned, without Miranda warnings and stated, "I don't know anything about this, ask Mario;" DELUCIA was questioned without Miranda warnings and stated, "I don't know anything about this, ask ANGELO."

Both defendants were taken to F.B.I. Field Office, signed Waiver of Consent forms and made statements exonerating themselves and inculpating each co-defendant, all within twenty (20) minutes of the arrest.

Mr. Wheeland, truck dispatcher for Pan American, testified that the defendant, DELUCIA was on the night shift from 11:30 P.M. to 7:30 A.M.; that GERBASIO was on the day shift from 7:00 A.M. to 4:00 P.M.; GERBASIO's time card reflecting his punching in at 6:58 A.M. on October 23, 1975 admitted in evidence; an assignment sheet reflecting GERBASIO on standby status for random assignments and notations

reflecting that he was scheduled for a union meeting sometime during the day was also admitted into evidence. Wheeland stated that he did not specifically assign either GERBASIO or DELUCIA to the truck in question. Wheeland stated that while on standby status GERBASIO, a union representative, was allowed to accept short run jobs.

Mr. Elmore Clinton of Pan American, testified that a union meeting was scheduled for GERBASIO around 10:30 A.M. on October 23, 1975.

The actual statements made by the respective defendants to the F.B.I. were redacted to eliminate the crossimplication of impropriety as against one another and said
statements were admitted into evidence for the jury's
consideration.

In sum and substance, the only evidence implicating the defendant, GERBASIO were the observations demonstrating GERBASIO as a passenger in a truck wherein stolen articles were contained.

It is submitted that this evidence is insufficient to establish guilt under each count of the indictment beyond a reasonable doubt as to the defendant, GERBASIO. Conspicuously absent from the testimony was any evidence that the defendant, GERBASIO was a participant in any conspiracy or that the defendant, GERBASIO had actual knowledge that the goods in the truck were stolen; or that the defendant,

GERBASIO ever saw, touched, or handled the goods in question.

Bearing in mind that mere association between the defendant GERBASIO and the co-defendant in and of itself is not proof of participation in a conspiratorial plan, and bearing in mind that mere presence by the defendant GERBASIO, alone, does not impose criminal conspiratorial responsibility upon him nor give rise to the necessary criminal intent under the second count of the indictment, taken in toto, there is a failure to establish guilt beyond a reasonable doubt by reason of the lack of evidence in the case at bar.

To complicate matters more, the statement of the defendant, GERBASIO was redacted; while this redaction occurred at the Court's bequest in order to prevent a severance in the midst of the trial and in order to prevent the Bruton issue from prejudicing each defendant, in effect, the defendant, GERBASIO was deprived of having his statement in its entirety before the jury.

This Court should bear in mind that absent the redaction in question, a true and real Bruton issue existed.

In an attempt to save the trial and reduce prejudicial effect to the accused, this Court reasoned out that redaction might be the appropriate remedy; however, unfortunately, the remedy left this jury with incomplete statements and unexplained incomplete statements by the defendant, GERBASIO.

It is reasonable to imagine the legal disparity

that existed between both defendants at the time of trial; if the defendant, GERBASIO were to have testified, then and in that event, the entire statement made by him to the F.B.I. would have been before the jury; this would have precipitated the co-defendant into testifying wherein his entire statement would have been admissable and before the jury. While such situation would have eliminated a Bruton issue, it would have created a serious conflict of testimony wherein the jury would then have had to decide which of the defendants were truthful, both statements exonerating themselves and implicating the other. It seems almost unconscionable that an accused must relinquish one constitutional right in order to avail himself of another constitutional right.

In retrospect, the Court's attitude as reflected during the course of the trial, tending to grant a severance would have been the safer and less prejudicial approach and would have afforded at least the defendant, GERBASIO, an opportunity to fully explain his presence and his conduct and his actions related to the incidences herein.

Realistically, the case against the defendant,
GERBASIO, is most tenuous at its best. While circumstantial
evidence could lead to the conclusion rendered by the jury
herein, the evidence presented at the within trial does not
reach the height or caliber or quality to constitute proof
of guilt beyond a reasonable doubt.

Even construing the trial testimony most favorable to the government, one should readily reflect that the quality of testimony herein accompanied by the judicial decision of redaction - although earnestly made to protest both the accused and the government - does not establish guilt of the defendant beyond a reasonable doubt.

All motions made during the course of the trial herein are renewed and reiterated anew for this Court's consideration.

That no previous application has heretofore been made herein.

WHEREFORE, your affirmant respectfully prays that this Court set aside the guilty verdict returned on May 11, 1976, and grant the instant motion for judgment of acquittal.

Dated: Brooklyn, New York June 28th, 1976

MICHAEL S. WASHOR

May 11, 1976

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SAME TITLE

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## STATEMENT BY GERBASIO AT TRUCK AT ARREST

Date of transcription 10/28/75

1.

At approximately 9:20 AM, Pan American Airlines (PAA) Thick Number 341002, bearing New York License 2104LS, was stopped at the corner of South Gannon and Willowbrook Road, Staten Island. ANGELO GERBASIO was sitting on the passenger side of the truck.

GERBASIO was asked by SA FRANCIS R. JULES where he was going and he replied, "Ask MARIO, I'm helping him".

The door of the unlocked truck was opened by SA

JULES and found to contain 31 cartons of merchandise under

PAA Airway Bill Number 67684761.

ANGELO GERBASIO was advised that he was being arrested for violation of Title 18, Section 659, Theft
From Interstate Shipment. SA WALTER F. YOOS advised GERBASIO of his rights as they appear on the "Waiver of Rights" form.

GERBASIO was transported to the Federal Bureau of Investigation Office at John F. Kennedy International Airport.

Interviewed on 10/23/75 at Staten Island, New York, File #15-69071 by SAS FRANCIS R. JULES and WALTER F. YOOS; jmw Date dictated 10/24/75.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

# STATEMENT BY GERBASIO AFTER ARREST AS REDACTED

Date of transcription 10/28/75

ANGELO GERBASIO read his rights as they appear on a "Waiver of Rights" form. He stated that he understood his rights and signed this form.

GERBASIO stated that on the morning of OCtober 23, 1975, he came to work about 7:15 AM and about 8:00 AM, was asked to help on a truck.

ANGELO stated that he had no idea where he was going and did not know the truck contained any freight. ANGELO stated there was some conversation in the truck and he believed that he was going for a pick up at some pier in Staten Island.

ANGELO stated he could not furnish any further information:

The following background information was obtained from observation and interview:

> Name Date of Birth Place of Birth Height Weight Hair Eyes

Military

Children

ANGELO GERBASIO December 17, 1944 Brooklyn, New York

Five feet, seven inches tall 205 pounds

Brown Brown

United States Army 1963 to 1965

Serial Number US# 51518155

Honorable Discharge

Marital Status Wife

Married JACQUELINE

Two boys - age 7 and 4

Interviewed on 10/23/75 at Kennedy Airport, www York File #15by SA FRANCIS R. JULES and SA WALTER F. YOOS: jmw Date dictated 10/24/75. This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

THE CLERK: United States against Mario J. De Lucia and Angelo Gebrasio.

MR. WASHOR: Before we proceed with the hearing, your Honor, might I indicate for the Court's edification that there are several aspects that we are seeking to suppress: Firstly, the physical evidence that was seized and confiscated by the agents on October 23, 1975, and in addition thereto, two sets of statements, if I can categorize one set of statements having occurred at the time of apprehension or arrest on the street in Staten Island, and the second statement or set of statements, if I can categorize them, as having been obtained back at the Pan Am Building some half an hour or hour or so after the initial apprehension or time of arrest.

MR. LEVIN-EPSTEIN: I think they occurred at the FBI office, not Pan Am.

THE COURT: At the airport.

MR. IEVIN-EPSTEIN: Yes, your Honor, at the airport.

MR. WASHOR: Yes. That's the physical or nonexisting evidence I am seeking to suppress.

I would say that the hearing be considered as

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and I have discussed this briefly in the hallway before. But, of course, for the record, the Government is fully prepared, should it become necessary, to produce every one of the cartons and coats seized and have them produced in court and marked as exhibits.

MR. WASHOR: I have no desire for that, your Honor.

THE COURT: There will be hardly room for the rest of us.

MR. IEVIN-EPSTEIN: That's why I selected the course of action which I did.

THE COURT: All right.

MR. IEVIN-EPSTEIN: The Government calls its first witness in the motion to suppress and the hearing thereto, Special Agent John Westhoff.

JOHN WESTHOFF, having been called as a witness in behalf of the Government, was duly sworn and testified as follows:

THE CLERK: State your name, sir.

THE WITNESS: John Westhoff, W-E-S-T-H-O-F-F.

MR. LEVIN-EPSTEIN: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

## BY MR. LEVIN EPSTEIN:

- Q Would you state your full name and occupation for the Court, please.
- A John E. Westhoff, Special Agent with the FBI, assigned to Kennedy Airport.
  - Q How long have you been an FBI agent, sir?
- A Sixteen years.
- Q And in your sixteen years, how long have you been assigned to JFK Airport?
- A The last three years.
- Q And in the last three years, can you briefly describe what your duties and responsibilities have been at the airport?
- A Investigating mostly thefts from interstate shipment and any other federal files.
- Q Speak into microphone, Agent Westhoff.

  Directing your attention to October 23, 1975,

  were you working on that day?
- A Yes, I was.
  - Q Were you working alone or with a partner?
- A I was working with a partner.
  - Q Speak up a little.
- A I was working with a partner.
  - Q What was his name?

- A. Joseph Phelan, P-H-E-L-A-N.
- Q Is he also a Special Agent with the Federal Bureau of Investigation?
- A He is.
- Q And on that day, directing your attention to the early morning hours of that day, could you describe for the Court what your official duties were?
- A We were surveilling in the Pan American Cargo Terminal.
  - MR. WASHOR: Could we get a time, your Honor?

    MR. LEVIN-EPSTEIN: Mr. Washor anticipated my
    next question.
- Q Agent Westhoff, can you estimate for Mr. Washor approximately what time your surveillance commenced?
- A It would be about midnight.
- Q That would be midnight the end of the 22nd and the beginning of the 23rd of October?
- A That's right.
  - Q All right.

Could you tell the Court, please, where you were situated with respect to Cargo Building 67 when you and Agent Phelan initiated this surveillance?

A We were parted in the employees' lot by cargo building, the Pan Am cargo building.

THE COURT: The employees' what?

THE WITNESS: Parked in the employees' parking lot.

THE COURT: Oh.

- Q Approximately how far from Cargo Building 67?

  A I would estimate fifty to seventy-five feet.
- Q Did you have with you any aids to your eyesight of any kind, telescope, binoculars or things of that sort?
- A I had binoculars.
- Q Were you using the binoculars on that evening?

  A Yes, I was.
- Q Were you able to see Cargo Building 67 through the binoculars?
- A Oh, yes.
- Q Were you able to see any particular portion of Cargo Building 67 that was the subject of your surveillance?
- A Yes, we were viewing Bay Number 9.
- Q And that's an opening in the building where goods are delivered?
- A That's correct.

MR. WASHOR: For the record, your Honor, since there is no jury, I have not objected to any leading questions.

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Q And do you know where the other agents and the police officer were situated during the course of the surveillance?

A Yes.

Q Were you in radio contact with them?

A Yes, we were.

Q Now, directing your attention to approximately
2:35 in the morning, did anything happen that you noticed
with respect to your surveillance?

A We observed a truck in Bay 9 being loaded with merchandise.

Q And can you describe the merchandise being loaded in the truck in Bay 9?

A The cartons.

Q Were you able to see or observe from your vantage point in the surveillance, who it was that was loading the truck?

A Yes, I was.

Q Do you see that person in court here today?

A Yes, Id.

Q Would you point him out, please, for the Court.

A The gentleman in the middle of the table.

Q There are four gentlemen there.

- A In the middle, next to counsel, with the glasses.
  - Q Are you indicating the --

THE COURD: What color jack t, please?

THE WITNESS: Grey.

MR. LEVIN-EPSTEIN: Indicating the defendant De Lucia, your Honor.

- Q What did you see Mr. De Lucia do?
- A He loaded the truck.
- Q Now, can you tell the Court what, if anything, occurred prior to your initiating the surveillance which caused you to be on the surveillance? In other words, had you received any information --

MR. SCHACHER: Objection to the form of the question.

THE COURT: Why were you surveilling?

MR. LEVIN-EPSTEIN: Thank you, your Honor.

Q Why were you surveilling the building at that time?

A We had information that some merchandise was going to be stolen.

MR. SCHACHER: Objection to the form of the -I'm sorry, withdrawn.

MR. LEVIN-EPSTEIN: Is there an objection, your Honor?

MR. SCHACHER: Objection.

MR. WASHOR: Objection as to "we".

THE COURT: If you mean to have it stricken,

say so. But he may testify in this form.

What I want and what we all want was the content of the communication.

MR. LEVIN-EPSTEIN: Thank you, your Honor.

Q You may answer.

A We were informed by a Pan American employee -- do you want me to give names, your Honor?

THE COURT: Yes.

Q Go ahead.

A By an individual working in Pan American, Mr. Godoy --

MR. LEVIN-EPSTEIN: G-O-D-O-Y.

Q Go on.

A (Continuing) -- that he had been approached by another employee at Pan American and this employee told him
that Mario De Lucia had approached him and wanted to steal
some merchandise, and this is how we got involved in the
case.

Q As a result of having received this information, what, if anything, did you do?

A We set up a surveillance on the Pan American

building.

Q And this is the surveillance you previously described, sir?

### A That's correct.

Q Now, after you observed Mr. De Lucia loading the truck during the course of your surveillance, what, if anything, did you do then?

A We maintained the surveillance on the truck and Mr. De Lucia moved the truck to the south side of the Pan Am parking lot.

Q When he moved the truck, was he alone or with someone else?

## A He was alone.

Q Did you follow him in the truck to the south side of the Pan American building?

A We moved to the south side of the Pan American building and continued our surveillance on the truck.

Q What, if anything did you observe as you continued the surveillance of Mr. De Lucia on the truck?

A Well, nothing happened until about eight o'clock the next morning.

Q Let me interrupt you for a moment.

Did Mr. De Lucia stay with the truck?

A No, he did not.

- Q What did Mr. De Lucia do that you observed?
- A He returned to the Pan Am cargo area.
- Q To the best of your recollection, what time did Mr. De Lucia leave the truck and return to the building on that night?
- A 2:40, perhaps.
  - Q That's 2:40 A.M.?
- A That's correct.
- Q Did you maintain surveillance on the truck following 2:40 A.M.?
- A Yes, we did.
- Q For approximately a -- rather, until when did you maintain the surveillance?
- A Until approximately eight o'clock that morning.
- Q And what, if anything, happened at 8:00 A.M. the morning of October 23rd that you observed?
- A Mr. De Lucia and the other defendant, Mr. Gebrasio --
  - Q You recognize Mr. Gebrasio?
- A Yes.
  - O Did you see him that morning?
- A Yes.
- Q What did you see Mr. De Lucia and Mr. Gebrasio do that morning?
- A They got into the Pan Am truck and drove it out

through the gate.

- Q What gate was that, sir?
- A It's the entrance gate to the Pan Am cargo area.
  - Q And what happened then?
- A They gassed the truck up and left.
- Q Did you have occasion to follow them at this time?
- A We did.
  - Q And you and Special Agent Phelan?
- A Yes.
- Q And there were other agents involved in this moving surveillance?
- A Yes, there were.
- Q These were the agents you mentioned in previous testimony?
- A Yes, it was.
  - Q By what means did you follow the truck, sir?

    MR. WASHOR: I will stipulate they followed by
    automobile somewhere behind the truck.

MR. IEVIN-EPSTEIN: Your Honor, the Government has not offered to stipulate to anything.

THE COURT: Did you keep an uninterrupted sight of them?

THE WITNESS: Yes, your Honor, we did.

MR. WASHOR: I stipulate to that.

MR. LEVIN-EPSTEIN: The Government is not offering to stipulate to it, because it's relevant and pertinent to the issue of probable cause, as the Court will become properly aware.

THE COURT: I will bow to your knowledge of the events.

MR. LEVIN-EPSTEIN: Thank you, your Honor.

Q Special Agent Westhoff, would you describe to the Court, please, what route and what actions you observed Mr. De Lucia take with Mr. Gebrasio in the truck?

MR. WASHOR: I have to object to the form of the question.

THE COURT: Can I hear it read, Mr. Rapaport?

(The Court Reporter reads the pending question.)

THE COURT: Overruled.

- Q You may answer it.
- A The truck was driven --
  - Q Let me just interrupt.

    Who was driving the truck?
- A Mr. De Lucia.
  - Q And Mr. Gebrasio was a passenger?
- A That's correct.
  - Q Continue.

A The truck was driven out of the airport into Brooklyn and then into Staten Island.

Q Did you follow the truck into Staten Island?

A Yes, we did.

Q By what route did the truck take from Brooklyn into Staten Island?

A I don't specifically recall the street.

Q Did you travel with the truck over a body of water?

A Oh, yes.

Q Yes.

Was there a bri e?

A Yes, the Verrazano Bridge.

Q That's all I'm asking, Agent Westhoff.

A Yes.

Q Upon your arrival following the truck into Staten Island, can you describe the action that the truck took while you were following?

A Well, it slowed down a few times. It stopped a couple of times. And then, as I said, I can't recall the exact streets, but then it turned away from the direction of Staten Island and started heading back towards New York City.

Q Now, Special Agent Westhoff, let me ask you

question, your Honor.

Q Special Agent Westhoff, have you ever had oc-

THE COURT: I think maybe this is enough for me. I think we have all read at least one hundred stories, seen it on T.V., movies, everything else. So let's get on with it.

MR. LEVIN-EPSTEIN: Okay.

Q Based upon your observations of the manner in which the truck was driven, can you formulate an opinion as to what manner that truck was driven?

MR. WASHOR: Objection, your Honor.

THE COURT: Objection is overruled. It calls for the opinion of a veteran of one hundred such surveillances.

- Q You may answer the question, Agent Westhoff.

  A Maybe fifteen, twenty times.
- Q No. My question is: Can you formulate an opinion as to what they were trying to do in this truck?

THE COURT: What, if any, inference did you draw from the way in which the truck was being driven so far as route, direction, maintenance of direction?

THE WITNESS: What opinion did I form from the

way they were driving, your Honor?

THE COURT: At the time.

THE WITNESS: At the time, yes.

At that time I formed the opinion that they had made our surveillance. In other words, they knew we were following them.

THE COURT: So you inferred that they realized or thought they were being followed?

THE WITNESS: Yes, sir.

Q And did you discuss this opinion that you have drawn with other agents involved in the surveillance?

Q As a result of having this discussion, what, if anything, happened?

A We pulled the truck over.

Q In what manner was the truck pulled over, sir?

A Turned on the sirens and drove next to the truck and

told them to pull over.

Q Was there a red flamhing light displayed?

A Yes, there was.

Q Did the truck pull over at that point?

A Yes, it did.

A Yes.

Q Now, when the truck pulled over, did you have occasion to exit your vehicle?

- A Yes, I did.
- Q Where, if anywhere, did you go when you exited your car?
- A I went to the driver's side of the truck.
- O Did you have a firearm in your possession at that time?
- A I did.
- Q And is it the regular firearm with which you carry out official business?
- A Yes.
- Q Was that firearm displayed at that time?
- A No.
- Q Do you have identification you carry in your person at all times?
- A Yes.
- Q Does that identification say you are a Special Agent of the Federal Bureau of Investigation?
- A Yes, it does.
- Q Did you display that identification at that time?
- A Yes, I did.
- Q Did you have occasion to speak to either or both Mr. De Lucia of Mr. Gebrasio at that moment?
- A I spoke to Mr. De Lucia.

- Q What, if anything, did you say to him, sir?
- A s best I can recall, I said, "Where are you going?"
- Q Was this before or after you displayed your FBI credentials?
- A When I hit the truck I pulled the badge up and said, "FBI, come out of the truck."
  - Q Did he comply with your instructions?
- A Yes, he did.
  - Q You said you said to him something.
- A "Where are you going?"
  - Q Did he respond?
- A He said, "Ask Angelo. I'm helping him."
  - Q What happened then?

    THE COURT: After Angelo.

THE WITNESS: "Ask Angelo. I'm helping him."

- Q What happened then, sir?
- A I placed them under arrest, violation of Title 18, Section 659.
- Q And what happened after you placed Mr. De Lucia under arrest, sir?
- A I orally advised him of his rights and took him to the FBI office at Kennedy Airport.
- Q Now, can you tell us whether or not you advised him of his rights as you described it, from memory or

from a document?

A I read his rights to him at the truck. And then when we got to the office, I gave him a document to sign.

Q Well, directing your attention still to the point at the truck at the moment of arrest, you said you read his rights to him?

A That's correct.

Q Did you read them from a card or piece of paper or something?

A A card.

Q Do you have that card in your possession today?

A Yes.

Q Can I see it?

A Yes.

(Card referred to is handed to Mr. Levin-Epstein.)

MR. LEVIN-EPSTEIN: Your Honor, can this be marked Government's Exhibit 1 for Identification for the suppressing hearing?

THE COURT: Do you want to put it in an envelope and mark the envelope?

Q Do you have others? Would you like this back?

A I would like it back.

MR. LEVIN-EPSTEIN: It's all right, your Honor.

THE CLERK: Government's 1 for Identification so marked.

Q Special Agent Westhoff, I show you what has been marked Government's 1 for Identification and I ask you to direct your attention to that card and tell the Court whether or not this is the card you used to advise Mr.

De Lucia of his rights on October 23, 1975.

A It is.

Q The very same card?

A The very same card.

Q And did you read what is printed on this card to Mr. De Lucia?

a I did.

MR. LEVIN-EPSTEIN: I offer it in evidence.

MR. WASHOR: No objection at this hearing.

MR. LEVIN-EPSTEIN: As to De Lucia.

MR. SCHACHER: No objection.

THE CLERK: So marked Government's 1 in Evi ance.

(So marked in evidence.)

Q For the record and for the Court's edification, Special Agent Westhoff, would you read the rights --

MR. WASHOR: Your Honor, it's in evidence. The Court can look at it.

THE COURT: Is it the same one? May I read it?

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MR. LEVIN-EPSTEIN: Yes.

If it please the Court, I can represent to the Court what you're holding in your hand is a miniature version of the full FBI form.

THE COURT: I can see that.

You did not request then for him to sign anything?

THE WITNESS: No, sir, no.

Q After you advised Mr. De Lucia of his rights as they appear on Government Exhibit 1 in Evidence, for the purposes of this hearing, would you tell the Court what happened then?

A I brought them back to the FBI office at Kennedy Airport.

Q Did you transport them alone or did you transport them with another agent?

A I transported them with the Port Authority police officer.

- Q Is that Officer Haynes?
- A That's correct.
  - Q Or Detective Haynes?
- A He is sergeant now.
  - Q Sergeant Haynes.

Now, while you were present after having placed

Mr. De Lucia under arrest, did you observe other agents of the FBI on the scene as well?

A Oh, yes.

Q Can you tell the Court what, if anything, occurred with respect to the truck that you may have observed at that time?

MR. WASHOR: Can we make inquiry at this time, your Honor, whether or not the Government is going to use this witness to perpetuate heresay testimony, instead of another agent?

I recognize the admissibility of certain heresay testimony at a hearing, but --

THE COURT: He is also a witness as to what he saw at the time and place of the arrest.

MR. LEVIN-EPSTEIN: That's exactly right, your Honor. The question requests a responsive answer of what he saw, not what he heard said.

You may answer the question. What did you see the other agents do, if anything?

A They opened the rear of the truck.

Q Did you observe them find anything in the ear of the truck?

A There were cartons in the rear of the truck.

MR. LEVIN-EPSTEIN: Your Honor, at this time I

THE COURT: Then it's agreed in all there were thirty-one on the truck?

MR. LEVIN-EPSTEIN: Yes.

Q Did they all substantially resemble this carton marked 2 in Evidence?

A Yes, they did.

Q Did they all bear, as you later learned, the same airway bill number that you just read?

A Right.

Q Thank you.

Now, following the seizure of these carton of coats, did there come a time when you returned to the FBI office at JFK Airport, as you described before?

Yes.

Q Did Mr. De Lucia go with you?

A He did.

Q In custody?

A Yes.

Q And when you arrived at the airport office of the FBI, did you have occasion to speak to Mr. De Lucia at that time again?

A Yes.

Q What, if anything, did you say to him and what did he say in response?

- A The first thing I did was give him an advice-ofrights form.
- Q What is an advice-of-rights form, for the record?
- A It explains the witness' rights in detail to him.
  - Q The witness?
- A Rather, the subject. The defendant's rights in detail.

MR. LEVIN-EPSTEIN: Your Honor, I ask that this document be marked the Government's next exhibit in sequence, for Identification.

THE CLERK: So marked Government's 3.

- Q Special Agent Westhoff, I show you what has, been marked Government's Exhibit 3 for Identification for the purpose of this hearing, and ask you if you recognize that document?
- A I do.
- Q Could you tell the Court what it is about this document you recognize?
- A It bears my signature.
  - Q Would you indicate where that is?
- A Right there.
- Q Next to the word "witness" on the top of that line?

- A That's right.
- Q Does there appear also on here the signature of another person or other persons placed there in your presence?
- A That's correct; Mario De Lucia and Francis Jules.
- Q And Francis Jules, as you indicated before, is another agent of the FBI?
- A That's correct.
- Q Now, is there a time affixed to this document or placed on this document as to when your signature was placed on this document?
- A 10:08 A.M.
- Q Now, what I am indicating with my finger, does there appear another time and place indicated in pen?
- A 10:05 A.M.
  - Q And what is the location?
- A JFK.
  - Q And the date?
- A 10-23-75.
- Q Now, with respect to Government's Exhibit 3 for Identification, can you describe for the Court, please, what it was that you did with respect to Mr. De Lucia?
- A I handed him this document and asked him to read it.

I asked him if he understood his rights, and he indicated he did. I asked him if he would sign it, and he did.

MR. LEVIN-EPSTEIN: I offer it in evidence, your Honor.

MR. SCHACHER: For the purposes of this hearing, your Honor, I have no objection, sir.

THE COURT: Received.

THE CLERK: So marked Government's 3 in Evidence.

(So marked in evidence.)

MR. LEVIN-EPSTEIN: Your Honor, I would ask the Court to just simply look at the document without burdening the record with Agent Westhoff reading everything in it.

THE COURT: It seems to me I have seen something like it before.

MR. LEVIN-EPSTEIN: It is the standard FBI advice-of-rights form, your Honor.

Q Mr. De Lucia signed that document in your presence?

A Yes, he did.

Q After where it says waiver of rights, did he not?

A Yes, correct.

Q Following Mr. De Lucia's waiving of rights by writing his name on that form, did there come a time when you or other agents of the FBI interviewed him?

A Yes, Mr. Jules and myself.

Q Were you present during the course of this interview?

A Yes.

Q Would you describe, please, what you and Special Agent Jules said to Mr. De Lucia and what Mr. De Lucia said in response?

MR. WASHOR: Can we get a time on this?

MR. LEVIN-EPSTEIN: The record indicates from the --

THE COURT: No, ask him.

When did the actual interview start, is what they want to know.

THE WITNESS: Right after -- within minutes, I would say, your Honor, after we read the form and signed it.

THE COURT: And in the office there?

THE WITNESS: Yes, sir.

THE COURT: Who else was present besides you and Mr. Jules?

Q Was there anyone else present?

- A Not to my recollection; I don't think so.
  - Q Just the three of you then?
- A Right.

MR. LEVIN-EPSTEIN: For the record, your Honor, the notation after Special Agent Westhoff's name is 10:08 A.M.

THE COURT: And would you proceed then to tell us what comprised the interview.

THE WITNESS: We asked him what he had been doing in the truck. And as best I can recall, he said he was requested by a supervisor at Pan Am to work some overtime and would he help out Mr. Gebrasio in the truck.

Q Did you ask him anything else -- let me ask you this --

MR. WASHOR: There is a question before the witness.

MR. LEVIN-EPSTEIN: I withdraw the question.

MR. WASHOR: I ask it not be withdrawn.

THE COURT: Can you answer the question?

THE WITNESS: Sure.

THE COURT: Please answer it.

THE WITNESS: I asked him if he was involved in the theft of this merchandise.

Q What did he say?

He indicated he was not. And he did indicate that he had in fact loaded the truck that night and drove it over to the south side and then left it, and he said he had nothing to do with the stealing of the merchandise. He said he was simply helping out another Pan American employee.

O Did he tell you the name of the Pan American employee he was helping?

A Mr. Gebrasio.

Q The other defendant?

A That's correct.

Did you ask him any further questions that you can recall, and did he give you any other further answers you can recall at this time?

A Not really.

Q Have you exhausted your recollection as to the responses made to the questions to Mr. De Lucia at this time?

A Yes.

MR. LEVIN-EPSTEIN: I ask this be marked as the next Government exhibit in sequence.

THE CLERK: Four.

Q As a result of the interview you had with

Mr. De Lucia, did you cause a report to be prepared of that interview?

A Mr. Jules did.

Q And did you take part in the preparation of that report?

A Yes.

I show you what has been marked for identification as Government's Exhibit 4, and I ask you if Government's Exhibit 4 for Identification refreshes your recollection as to any additional questions and/or answers that may have taken place during the course of this interview with Mr. De Lucia.

Have you had an opportunity to review Government's 4 for Identification?

A Yes.

Q Is your recollection now refreshed as to any additional information that Mr. De Lucia provided to you?

A Well, he said that --

MR. SCHACHER: Objection, your Honor.

- Q The question is, is your recollection refreshed?

  A Yes.
- Q Would you please tell the Court, now that your recollection has been refreshed, what Mr. De Lucia said, if anything.

A He assumed Mr. Gebrasio had the keys to the truck and had gotten them from the supervisor, Mr. Whelen.

Q And did he say anything else?

You may again refresh your recollection if it needs refreshing.

A I don't know what I have left out, Counselor, really.

Q Very well.

After Mr. De Lucia was interviewed by you and Special Agent Jules, what, if anything, happened then?

A He was fingerprised and photographed and brought for arraignment.

MR. LEVIN-EFSTEIN: I have no further questions of this witness at this time, your Honor -- just a moment, your Honor -- no further questions at this time.

MR. WASHOR: May we, your Honor?

THE COURT: Yes.

MR. WASHOR: Notwithstanding the order of indictment, does the Court have any requirement --

THE COURT: No, sir; certainly not.

### CROSS EXAMINATION

## BY MR. WASHOR:

Q Sir, what is the date that you got the information about the theft?

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MR, WASHOR: Yes, as to the observations made, et cetera, so the Government is not put at a disadvantage. We are looking to move this along, your Honor.

MR. LEVIN-EPSTEIN: Upon Mr. Washor's stipulation or concession, as he phrased it, that Special Agent Yoos made certain surveillance observations which were substantially the same as previously testified to by Special Agent Westhoff, your Honor, the Government calls Special Agent Yoos at this time, for the suppression hearing.

WALTER YOOS, having been called as a witness in behalf of the Government, was duly sworn and testified as follows:

### DIRECT EXAMINATION

## BY MR. LEVIN-EPSTEIN:

Q Just for the record, Special Agent Yoos, you are a Special Agent with the FBI?

# A Yes, sir.

Q You have been employed by the FBI how many years?

# A Twenty-five years.

Q And you are currently assigned to the JFK Airport?

A Yes.

Q Directing your attention to October 23, 1975, sir, did you participate in a surveillance and arrest?

A Yes, sir.

Q Could you tell the jury, please, whether or not you personally -- I beg your pardon, tell the Court whether or not you personally made an arrest on that day?

A Yes, sir, I did.

Q Would you tell the Court, please, who it is you placed under arrest?

A Angelo Gebrasio.

MR. LEVIN-EPSTEIN: Indicating the defendant Gebrasio, sitting at counsel table, your Honor.

Q Where did the arrest take place of Mr. Gebrasio?

A South Gannon and Willowbrook Poad in Staten Island, New York.

Q That occurred after a moving surveillance of a particular vehicle?

A Yes, sir.

Q Was Mr. Gebrasio in that vehicle?

A Yes, sir.

Q What kind of vehicle was it?

- A It was a Pan American truck.
- Q Did there come a time on the Pan American truck in which Mr. Gebrasio was travelling, did there come a time that that truck was brought to a halt?

A Yes, sir.

Q Were you surveilling and following the truck with other agents at that time?

A Yes, sir.

Q And what, if anything, did you do, sir, when the truck in which Mr. Gebrasio was travelling was brought to a halt?

A We opened the passenger side of the truck where Mr. Gebrasio was sitting. We asked him for the papers for the truck. And Mr. Gebrasio said, "Ask Mario. He has them."

Q When you approached the passenger side of the truck, sir, did you identify yourself as an FBI agent?

Q In what way?

A Yes.

A Orally, and I also displayed my credentials to Mr. Gebrasio.

- Q When you say orally, what did you say?

  A FBI.
  - Q Now, during the course of your o ficial duties,

do you carry a firearm?

A Yes, sir.

Q And were you carrying a firearm on that morning?

A Yes, sir.

Q Did you display that firearm along with your credentials?

A Yes. sir.

Q By the way, after you approached the door and opened it, did Mr. Gebrasio have occasion to leave the truck?

A Yes, sir.

Q Did you holster your firearm at that point?

A Yes, sir.

Q After Mr. Gebrasio said, "Ask Angelo, I'm with him," or words to that effect, what, if anything, did yo ?

A I at that time advised Angelo of his rights, at which time I stated he had a right to remain silent --

MR. WASHOR: I will ancede at this time he gave him the requisite Miranda warnings.

MR. LEVIN-EPSTEIN: Will that also be conceded by Mr. Schacher, your Honor.

MR. SCHACHER: It doesn't pertain to my client.

THE COURT: He has no standing.

Do you agree you have none?

MR. SCHACHER: As to my client, I do, your Honor.

THE COURT: All right.

Proceed.

Q Tell us the rights.

THE COURT: Did you read them or give it to him from memory?

THE WITNESS: No, sir. I told him he had a right to remain silent; anything that he did say can be used against him in court; he had the right to an attorney and if he couldn't afford an attorney, an attorney would be provided for him; and also that he could stop answering any questions put to him at any time, and demand an attorney.

Q Did he acknowledge these rights when you advised him of them orally?

A Yes, sir.

Q What did he say?

A Yes.

I asked him if he understood them after I told him, and he said yes.

Q After Mr. -- at any time during your course of

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advising Mr. Gebrasio of his rights, did he tell you he did not understand English or anything of that sort?

A No, sir.

Q After you advised Mr. Gebrasio of his rights, what happened then?

At that time we proceeded to take -- Agent Jules at this immediate time placed Angelo Gebrasio under arrest for the to of interstate shipments.

Q Was that done in your presence?

A Yes, sir.

Q And what happened then, sir?

A Then we brought Angelo to the other side of the truck where Mario De Lucia was with the other agents.

Q Is that Mario De Lucia, the other defendant sitting at counsel table?

A Yes, sir.

Q Proceed. What happened then?

At that point Mr. Gebrasio was told he didn't have anything else to say at this point and he did not say anything else at this point. Agent Jules examined the back of the truck while I was with Mr. Gebrasio; come back and we put Mr. Gebrasio in a vehicle and transported him to the agency office at JFK.

Q Did you have occasion to look in the back of

the truck after Mr. Gebrasio was arrested?

A No, s'

MR. IEVIN-EPSTEIN: No further questions.

# CROSS EXAMINATION

## BY MR. WASHOR:

Q Can you describe how the truck was pulled over, sir?

A The truck was pulled over by my car pulling in front and asking them to pull over to the curb.

Q Who was in your car?

A In my car at that time was, I believe, Frank Jules.

O Co that Jules, Agent Jules was the driver?

A I was driving.

Q You were driving?

A Yes.

Q And Jules was the passenger?

A Yes, sir.

Q And pulled alongside the driver of the truck?

A Yes.

Q Which was De Lucia?

A Yes, sir.

Q Siren going?

A Yes.

Q And you flagged him over, so to speak?

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- Q You had your badge out?
- A Badge and credentials.
  - Q And both?
- A No -- credentials out.
- Q Credentials in one hand, gun drawn pointed at the defendant Gebrasio?
- A les, sir.
  - Q Yo' said, "FBI"?
- A Yes, sir.
  - Q You asked him to get out of the truck?
- A Yes, sir.
  - Q And he complied with your directive?
- A Yes, dir.
- Q And the next thing you did was ask him a question?
- A Yes, sir.
  - Q What question did you ask him?
- A I asked him where the papers were for the truck.
  - Q He answered you?
- A Yes, sir.
  - Q Then you placed him under arrest?
- A Yes.
- Q And then you first advised him of the Miranda rights?

A Yes, sir.

Q You did not advise him of any of the Miranda rights prior to asking him where the papers were?

A That's correct.

Q Now, sir, you took him around from one side of the truck to the other side of the truck, Gebrasio I'm talking about?

A Yes.

Q And at that particular time you testified on direct examination that Gebrasio was told that he didn't have to say anything?

A That's correct, sir.

Q Am I correct?

You had already advised Gebrasio of his Miranda warnings on the other side of the truck?

A That's right.

Q Who told him he doesn't have to say anything?

A I did.

Q What did you say to him?

A I told him he had a right to remain silent and he didn't have to say anything.

Q You repeated then on the second side of the truck that which you had said on the other side of the truck?

A I said to him -- I didn't say the statement he had a right to remain silent. I said he did not have to say anything.

- Q And what did Gebrasio say or do when you said that to him on the driver's side of the truck?
- A He didn't say anything.
  - Q Okay.

Now you got him back to the FBI office, am I correct?

- A Yes, sir.
  - Q Did you interview him there?
- A Yes, sir.
  - Q Did you read him his rights there?
- A We furnished him a standard waiver of rights form.
  - Q And did you interview him there?
- A Yes, sir.
- Q Did you again tell him that he doesn't have to make any statement?
- A Yes, sir.
- Q And did you go through the entire Miranda warnings again?
- A Yes.
- Q And would it be fair to say he did make a statement?

A Yes, sir.

Q And would it be fair to say he waived his rights?

A Yes, sir.

Q Knowingly so, am I correct?

A Yes, sir.

Q By the way, did he admit that he knew he was in a truck that had stolen goods?

A Yes, sir.

Q Did you confront him with that fact?

A Yes, sir.

Q Did you tell him there were stolen goods on the truck?

A After he made his statement.

Q What did you say to him?

A At what point, sir?

Q When you told him there were stolen goods on the truck, tell us the words --

THE COURT: In what words did you convey to him the idea that the goods were stolen?

THE WITNESS: After Mr. Gebrasio made his statement to us, going through what he said had happened, I said, "Did you know there was stolen merchandise on this truck?"

Q And what did he say?

A "No."

Q Did he tell you that he had gone to work around 7:00, 7:30 in the morning?

MR. LEVIN-EPSTRIN: Objection. Leading, your Honor.

MR. WASHOR: I will withdraw the question.

Q Tell us what Gebrasio said to you back in the FBI office?

A Mr. Gebrasio told us that he arrived at work approximately 7:15 A.M. Between that time and 8:00 A.M., Mario De Lucia approached him and, if I might, to the best of my recollection, stated Mario told him that he had a heavy load, not to ask him any questions and not to say anything to anybody, to anyone.

After that, he also stated that he was the shop steward. In his statement he also said that from a conversation with Mario in the truck, he believed he was making a delivery to the piers on Staten Island.

- Q Anything else?
- A No, sir.
  - Q Did he say anything else at all?
- A Not to my recollection, sir.
  - Q And after he made that statement, what did

you do? What did you say?

A Nothing. I said if he didn't want to furnish any more information, that was it; does he wish to furnish a signed statement to this effect, and he said no.

- Q Did you say anything to him after that?
- A Not that I recollect.
- Q Didn't you tell him about the goods being stolen?
- A Yes, sir, I told him that.
  - Q Tell us what you said.
- A I told him the merchandise was stolen, the cartons that were found in that truck were stolen from the cargo building where he is employed.
  - Q And what did he say, if anything?
- A He didn't say anything to that.
  - Q What else did you say?
- A To my recollection, that's about the sum total we talked about.
- Q Didn't you ask him that you knew it was stolen?
- A We asked him that and he stated that in his statement, that he did not know the merchandise was not stolen.
  - Q Did you tell him that you had the truck under

observation from 12:00 midnight until the time it was stopped?

- A No, sir, I did not recall that.
  - Q Did you tell him any --

MR. IEVIN-EPSTEIN: 1 object. This questioning is in the nature of discovery, not in the nature of a motion to suppress.

THE COURT: Overruled.

- Q Did you tell him that you saw the truck being loaded by De Lucia?
- A No.
- Q Did you tell him -- he wasn't questioned in the presence of De Lucia. Is that correct?
- A Correct.
- Q Did you tell him De Lucia was being questioned by other agents in an adjoining room?
- A No, I didn't tell him that.

MR. LEVIN-EPSTEIN: I object. The witness testifies to the best of his recollection that he didn't say anything else and Mr. Washor is testifying what he would like to hear of the witness and make a record of it, and I object.

THE COURT: I don't think he is getting anywhere. MR. WASHOR: That's a problem sometimes with the questioner, Judge.

MR. LEVIN-EPSTEIN: Objection to relevance.

THE COURT: It's a well-known technique to extort from persons in custody information which they have not got, by saying to them that others are talking, et cetera, et cetera, et cetera.

MR. LEVIN-EPSTEIN: I appreciate that, Judge -THE COURT: These efforts the witness insures
us were not employed on these occasions.

MR. LEVIN-EPSTEIN: That's my point, your Honor.

MR. WASHOR: One last question, your Honor.

- Q Did you tell Gebrasio that De Lucia had inculpated him, meaning Gebrasio, in any manner or form?
- A No, sir, not to my recollection.
- Q Did you see the truck searched at the scene of the crime -- scene of the arrest?
- A No, sir, I did not. I was with Mr. Gebrasio at the side of the truck.
- Q Do you know who, if any, of the agents searched the truck?
- A Agent Jules did, sir.
  - Q Agent Jules, your partner?

ever leave Gebrasio before you went back to the FBI?

A No, sir.

Q In other words, he was never alone with Jules.
Is that right?

A No. sir.

Q So, from the time he got back in the car to go back to the FBI office, did anybody ask Gebrasio permission to search the truck?

A No, sir, not that I know of.

Q Now, Agent Yoos, did anybody to your knowledge search the cab portion of the truck?

A I don't have any recollection of the search of the cab.

Q Was Gebrasio searched?

A Yes, sir.

Q By yoursel?

A Yes, sir.

Q Any leys to the truck found on his person?

A No, sir.

Q Any keys to any locks found?

A No. sir.

Q Do you remember what was found on his person?

A No, sir, I do not.

Q Would it be fair to say that you seized nothing

from his person?

A No. I believe to the best of my recollection, Mr. Gebrasio had a wallet on him.

- Q Did you go through the contents of the wallet?
- A Pardon?
  - Q Did you go through the contents of the wallet?
- A No. We searched him and he had a wallet on him.
  - Q Did you go through the contents of the wallet?
- A Not at that time, sir.
  - Q Did you return the wallet to the defendant?
- A At the time, no, not at that time.
  - Q Later on?
- A Yes, I returned it.
  - Q Did you return it with the contents?
- A Yes, sir.
- Q Would it be fair to say that you seized and kept nothing from the person of the defendant Gebrasio?
- A To the best of my recollection, we did not seize anything from him.

MR. WASHOR: No further questions.

MR. SCHACHER: Mike.

MR. WASHOR: Your Honor, just bear with counsel for a moment.

(Both defense counsel confer with each other,

## Walsh-direct

MR. LEVIN-EPSTEIN: Your Honor, the Government is ready to proceed, if it please the Court.

THE COURT: Go right ahead.

MR. LEVIN-EPSTEIN: The Government calls Special Agent Thomas Walsh, your Honor.

THOMAS P. WALSH, called as a witness

on behalf of the Government, having been duly sworn

by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

## BY MR. LEVIN-EPSTEIN:

- Q Briefly, Mr. Walsh, are you employed by the FBI?
- A I am.
  - Q How long have you been an FBI agent?
- A About twenty-nine years.
- And your current assignment is at the John F.
  Kennedy International Airport?
- A Yes, it is.
- Q Is it as resident agent of the FBI at the airport?
- A That is correct.
- Directing your attention to October 23, 1975, at approximately 2:15 in the morning, were you working at that time?

#### A I was.

MR. WASHOR: At what time?

MR. LEVIN EPSTEIN: 2:15 A.M., October 23rd.

Q Were you working at the John F. Kennedy Airport at that time?

#### A I was.

Q And in what capacity were you working at that time, sir?

A I was manning the radio and I was in communication with the cargo building telephone, that is I was in communication with the Pan American Building, Cargo 67, and also in radio contact with other agents who were working outside.

Q Do you know who these other agents were whom you were working with and whom you were in contact with by radio?

A I had an idea, generally speaking, and where they were parked, yes.

Did you know where generally, then, in what specific area of the airport they were, not the exact location?

A I knew that they were in the vicinity of cargo building 67, which is the Pan American Building.

Q Did you know what they were doing there?

A Yes. 48

- Q Can you tell the Court, please, what you knew?

  A Yes. These agents were working on a physical surveillance in a certain area of the cargo building, namely around the doors of 8 and 9.
  - Q And in cargo building 67?
- A In cargo building 67.
- Q And had you been aware of this surveillance prior to the time that it was initiated?
- A Yes, I was.
- Q Had you been a part of the planning stages of this operation?
- A I was.
- And in fact did you receive a particular assignment to man the telephones and radio?
- A Yes, I had.
- Mas there a specific purpose, sir, in your manning the telephones at about 2:00 or 2:15 that morning?

  A Yes, I manned the phones for the reason that I could maintain contact with a supervisor of Pan American who was working at the loading dock of Cargo Building 67.
- Q As you sit here, do you recall the name of that superintendent?
- A Yes, Fred Godoy.
  - Q Directing your attention once again to that

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can you tell the Court, please, what Mr. Godoy said to you and what, if anything, you said to him in response?

A Mr. Godoy called me on the phone about 2:15 and he told me that the thirty cartons of cargo that we were interested in had been moved in two tow trucks, and he furnished --

THE COURT: Moved?

THE WITNESS: Moved.

(Continuing) -- in two tow trucks, and he furnished the numbers at that time to me that were on the two tow trucks.

Q Let me interrupt you for just a moment. When he furnished these numbers to you, were you making notes of any kind?

Yes.

Q Did there come a time after that day when you memorialized those notes in an official report?

Yes, I took these notes into what we call an FD302.

Q That is commonly referred to as a 302?

A 302, right. A

Q As you sit here, can you remember specifically those numbers without assistance?

No, I couldn't because the numbers involved are in way bills which went to six, seven different --

MR. LEVIN-EPSTEIN: Your Fonor I am showing the

Walsh-direct

witness Government's Exhibit 3500-2.

Q I ask you, Special Agent Walsh, if you would refer to 3500-2, and once you have referred to it I ask you does it refresh your recollection or assist you in telling the Court what those numbers were?

Answer yes or no for the moment.

- Yes, it does. I mean these are the numbers that I put down, right.
  - So this does refresh your recollection --THE COURT: The numbers of what?

THE WITNESS: These are the numbers, your Honor, that appeared on the two tow carts, namely 655 --

THE COURT: Tow carts?

THE WITNESS: Two tow carts and these numbers were 655 and 831.

- Q Now, you mentioned before that Mr. Godoy also told you of an airway bill number?
- A Yes, he furnished two bill numbers to me, one --
  - Slowly, for the record, please.
- A One what is called an airway bill number and that number that he furnished to me was 02667684761, and then there is another bill which is known as the house way bill, . and the number on that was 561753.
  - What did Mr. Godoy tell you a out those two 51

67684761 --

THE COURT: Did I catch it wrong or was it

667?

MR. LEVIN-EPSTEIN: Am I wrong?

THE WITNESS: It was 02667684761.

MR. LEVIN-EPSTEIN: I left off a few digits.

I apologize, your Honor.

# BY MR. LEVIN-EPSTEIN:

Q Now, what was that number significant of, according to Mr. Godoy?

A Well, Mr. Godoy told me that this number was the airway bill number that was associated with the thirty cartons of cargo that were in the two tow trucks.

Q I interrupted you before. You were about to tell us what he told you.

What did he tell you about the thirty cartons, sir?

Well, at that time he told me that these were thirty cartons that we were interested in and these were the thirty cartons that were not supposed to be moved or loaded to a truck at that time.

Q Did he tell you from what source he got this information, sir?

A No, he didn't.

- Q Fromprior information that you had received, did you know from what source he was to get this information?

  A Well, from previous conferences with the agents, other agents who were working this case I knew that he was supposed to get this from another source of his on the dock at the time.
  - Q I see.

THE COURT: On the what?

THE WITNESS: Another source.

THE COURT: On the?

THE WITNESS: On the dock, on the loading dock.

MR. LEVIN-EPSTEIN: D-o-c-k.

By dock you mean the loading dock?

THE WITNESS: The loading dock in cargo building

67.

MR. LEVIN-EPSTEIN: I see.

- anything, Mr. Godoy told you during this first telephone call?

  A Well, he said the two tow carts with the thirty cartons had been left in the vicinity of the two doors or base, as we call them, the large doors, and he said they were in the area of doors numbered 8 and 9.
- Q You testified a moment ago that according to the previous plan of operations, the surveillance, as you knew 5.

- \*\*\*\* Will you tell the Court, your recollection having been refreshed, what description it was that he gave
- He said the truck in No. 9 door was a PAA or a Pan American cargo truck with a blue cab and a silver body.
- Was there anything else, any number or other description that he gave you?
- Yes, he said on the tailgate of this particular truck in the No. 9 door appeared the number 341002.
- Did there come a time -- I beg your pardon,

And he gave you the serial number that he said withdrawn. appeared on the truck, and did he tell you anything further on this first telephone call?

Well, outside of furnishing to me the numbers that appeared on the documents, the shipping documents, and the numbers that appeared on the tow carts, and the fact that the cargo was thirty cartons of cargo which were in the two tow carts, he simply said that they were there, this was the cargo that was not to be moved, and he said however that he expected it to be moved shortly.

> Very well. Q

Did there come a time when this telephone conversation was terminated by either you or Mr. Godoy or both? 54

A Yes. We terminated it, the conversation at that time, and it was a few minutes, it took me a few minutes to have this conversation.

Now, immediately after this telephone conversation, did you have occasion to use the radio equipment at the BI office?

A Yes.

After I received this information from Mr. Godoy, I immediately got in touch via radio with the cars that we had outside working on this surveillance.

- Q Who were the agents, if you know, who were working the surveillance on the outside, sir?
- A We were working at that time with Frank Jules, Walter Joyce --
  - Q Pardon me, is that J-u-l-e-s?

A Yes.

And Agent, an agent named Joseph Phalen and another agent named Jack Weshoff.

Q Go ahead, sir.

A I furnished this information to these agents, namely
I believe it was Frank Jules in one car and also Walter Joyce
in the other car.

Q Did they acknowledge the receipt of this information?

# BY MR. LEVIN-EPSTEIM:

- Q They actually told you that over the air?
- A That's right.
- 2 And you received that?
- A I did.
- Q What happened then, sir? Did you mreain in the office after you passed this information on?
  - A Yes, I remained there.

THE COURT: Mr. Levin-Epstein, I don't like to interrupt.

MR. LEVIN-EPSEDIM: Yes, sir.

THE COURT: All that was observed, or all that was said is the loading of the truck in the due and regular course of business of whatever.

Now, what I want to know is what, if anything, was said to anyone that would give them the idea that far from being a loading in the ordinary course of business, this was a felonious taking. That's all I want to know.

O Special Agent Walsh, in response to the Court's question directly, can you tell the Court what knowledge you had, and if so, what I nowledge did you

- A Yes, I do.
- O Can you assist in that matter in any way?
- A Well, when -- in the conferences we had held before I was on the telephone with Mr. Godoy we knew that there were thirty cartons involved. And when Mr. Godoy --

MR. LEVIN-EPSTEIN: Let me ask this
question, Judge, perhaps I can give us some assigance.

For the moment I don't believe that this witness particularly is the witness which will give information in which you're interested, but I can finish up with this one.

Q Just briefly, Special Agent Walsh, after you had this first converstaion with Mr. Godoy and made this radio message, did there come a second time for a telephone conversation?

A Yes, I received a second call from Mr. Godoy about two, 2:43, 2:45 λ.Μ.

Q And briefly what did -- I beg your pardon?

A It was about 2:43 or 2:45 A.M.

He simply told me that at that time this was the cargo that was not to be moved at that time.

Q Did you ever see any papers, invoices or bills of lading that would identify this cargo?

MR. LEVIN-EPSTEIN: Objection, been asked and answered.

THE COURT: I think he has said no, in answer to your earlier question.

Q Did you ever see the two tow trucks that had this merchandise -- that this merchandise was supposed to have been on?

A No, sir.

Now, you said there were two trucks from bay eight and bay nine, with one in each bay, right?

THE COURT: This desn't help us at all.

MR. LEVIN-EPSTEIN: There is nothing on redirect, your Honor.

The Government calls Special Agent Francis Jules.

FRANCIS R. JULES, having been called as a witness, was duly sworn by the Clerk of the Court, took the stand and testified as follows:

BY MR. LEVIN-EPSTEIN:

- Special Agent Jules, you have been here throughout the entire proceedings in this case thus far?
  - A Yes.
  - Q And you are a spe ial agent with the FBI?
  - A Yes.
  - Q The case agent in charge of this matter?
  - A Yes.
- Q will you have been since its inception?
  - A Yes, sir.
  - Q How many years are you with the FBI?
  - A Twenty-five.
- Q And you are currently assigned to JFK Airport?
  - A Yes, sir.
- Q Did you take an active role in the investigation of this case as case agent?
  - A Yes, I did.
- Q Directing your attention to October the 21st, 1975, were you working on that day, sir?
  - A Yes, I was.
  - On that day did you have occasion to meet

with one Joseph Butta?

A Yes, I did.

THE COURT: Gutto?

MR. LEVIN-EPSTEIN: No, B, your Honor, B as in bov.

I'm sorry, I will keep my voice up.

THE COURT: No, it's just that you have to watch that because I can't differentiate certain --

MR. LEVIN-EPSTEIN: B as in boy, your Honor.

Q And do you know who and did you know then who Joseph Butta was?

A Yes, his title was import director at .

Pan American, and that's at JFK?

A Yes.

 $\Omega$   $\,$  Did you have conversation with Mr. Butta during the course of your official duties?

A Yes, I did.

Would you describe to the Court, please, what Mr. Butta said to you and, what if anything you said in response?

. A OKay, I spoke to Mr. Butta. I had been

in Pan American Airvays on another matter. at this time.

-- and -- when it was brought to my attention by
the director of security, Mr. Parrillo.

- Q Let me interrupt, is Mr. Parrillo --
- A Correct.
- Q -- also present with you and Mr. Butta?
- A Yes.

(Continued on the next page.)

- Q Go on, sir.
- Mr. Parrillo advised me that his importing manager, Mr. Butta, had some information he wanted to furnish to us, the information was that a Mr. Godoy, a supervisor on the dock on the midnight to eight shift, was told by another employee named Joe Simon --

THE COURT: Simon, Joe Simon. Simon was an employee on the dock?

THE WITNESS: Simon was an employee on the dock.

Simon told his immediate supervisor Godoy that he had been approached by Mario Delucia and Mario told him that he was going to steal some freight from the dock on the midnight to eight shift, being Ocgober 22nd -- 23rd.

- Q In other words, the shift beginning on—at one minute past midnight or about on October 23rd?
  - A Correct, correct.
- Q Were the exact words that you heard from Mr. Butta and Mr. Parrillo that Mario was going to steal freight?
  - A Exactly.
  - Q And this was information that had been

any -- whether or not he would have any contact with Simon on those -- during that shift?

A Yes, he would under normal course of business.

Now, have you heard the testimony of other witnesses in this proceeding and hearing where certain surveillance observations were described?

A Yes.

Q And did you substantially make the same observations?

A No.

Q Were you at a different location during the surveillance?

A Yes, I was.

Q Where were you, sir?

I was out on the cargo service road.

I didn't observe anything on the dock. Just by radio communication.

Q Did you receive the radio communications which were described by Special Agent Walsh?

A Yes, I did.

Q In other words, you were at the receiving end of those --

A Yes.

- 0 -- initiated converstaions?
- A Yes.
- Q And did you acknowledge receipt of them?
- A Yes, I did.
- Q So you were aware of when Mr. Godoy called Special Agent Walsh?
  - A Yes.
- Q Were you aware of when the truck ultimately left the building the following morning at eight A.M.?
  - A Yes.
- Q And were you part of the moving surveillance that's been described?
  - A Yes, I was.
- Q And did you also go to Staten Island with part of that moving surveillance?
  - A Yes, I did.
- Q And did you participate and take part in the arrest of the two defendants, Gerbasio and Delucia?
  - A I did.
- Now, will you describe to the Court, please, what, if anything, you personally did on the scene in

#### Staten Island?

A Staten Island, at this point I was in the car with Special Agent Gilson and I was the one who advised Angelo Gerbasio that he was under arrest.

And I also asked Gerbasio what he was doing in Staten Island.

Gerbasio said to me "Ask Mario, I'm helping him."

Q And after that, what happened?

A I told the agent Yost, you -- you take him in the car. I went to the rear of the truck, which was unlocked, and I opened the truck.

Now, you heard some testimony, or rather questions on cross-examination about the locked or unlocked condition.

Do you have an independent recollection of whether that truck waslocked on that day?

A It was unlocked. I opened the door.

Q Was there any sort of seal or cargo seal over the latch to the door?

A No.

Q Was there any sort of paper or label sealing the door from --

A No. 65

A Yes, I was told this by Godcy.

Jules-Direct

- So, in other words, not only do -- did you have an understanding of it, but you were told specifically in this case.
  - A Right.
- Q What did Mr. Godoy tell you about that, sir? What was the difference?

A He told me that he would be in a position to see when, if, Mario Delucia would load any caro, and he in fact stated that his particular cargo was not scheduled to leave the airport, not scheduled to leave the dock or be loaded on any truck during this shift, which is the midnight to eight.

- Q And this is what Mr. Godoy told you on October the 21st?
  - A No.
  - Q I beg your pardon?
  - A No, no, no, that's wrong.
  - Q If I have misstated it, please correct me.
  - A Right. No, you're wrong in that.

The fact was that he had approached Joe Simon that he was going to steal some merchandise.

- Q You're speaking of who now?
- A Mario.

Q Go on.

A All right. We did not know, nor did Simon know, what merchandise at this point I was going -- he was going to steal.

Then it came when Godoy saw the tow carts being brought up, an as Agent Walsh had testified, that this cargo was not to leave the dock at this time because Godoy knew this, being a supervisor.

- . Q And was this transmitted to you in the car?
  - A Pardon me?
- Q Was that information transmitted to you in the car by Special Agent Walsh?
  - A By Walsh, right.
- Q So as you sat there in the car in the early morning hours of October 23rd you knew then that the cargo described by Mr. Godoy to Special Agent Walsh was not to be leaving Pan American's cargo facility on that shift.

A Correct.

MR. SCHACHER: Objection, your Honor, there was no description given by Mr. Godov as to what the cargo consisted of.

THE COURT: Overruled.

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Jules-Direct

cases is trying to get away from you, but I would say he is trying to lose you.

Q What does lose mean in your connection as compared to getaway?

THE COURT: All I want to know is did
you draw any inference from the course followed
by the truck that you had under surveillance
that night?

THE WITNESS: Yes.

Q What was that inference?

THE COURT: What inference did you draw and on what empirical basis in your experience?

THE WITNESS: In my experience, in fact

I said on the radio and gave the order "Pull

the truck over because they know they are being

tailed."

Now, upon what basis did you draw the inference that you felt that they, meaining Delucia and Gerbasio, knew they were being tailed, as you phrase it, what evidence did you --

- A All right.
- Q -- see or observe?
- A The truck -- the truck stoppin; on the

in Staten Island, then when it made a turn -- I forget the street completely, -- but it then started heading back toward the City.

I said "It's all over, we have been made, we'd better pull it over now."

Q Now, can you describe for the record primarily what you mean in plain language, not in slang, the phrase --

MR. LEVIN-EPSTEIN: Not necessary?

THE COURT: No. I'm well trained in

TV, radio and movies.

MR. LEVIN-EPSTEIN: Okay, I will withdraw on that question.

I have no further questions of the witness, your Monor, for purposes of this hearing.

CROSS EXAMINATION

## BY MR. WASHOR:

- Q Agent Jules, on October 23rd, 1975 you got out of your automobile on Staten Island with your brother agent Yost, am I correct?
  - A Yes.
- Q You went over to the side of the truck that would be designated the passenger side, am 1 correct?

- A Yes.
- Q Did you have your weapon drawn?
- A Let me see, no, I think I had my coat -I had my coat back with my hand on my weapon. I didn't
  -- I don't think I had it out.
- Q You heard Agent Yost testify, am I correct?
  - A Yes.
- Q No doubt in your mind that he had his weapon drawn, am I correct?
  - " A Yes, he did.
- Q Both of you went over to the side of the passenger car, weapon drawn by Yost?
  - A Right.
- Q And identified yourselves as members of the FBI? .
  - A Yes,
- Q Flashed either a shield or some form of identification?
  - A Correct.
  - Q Directed and ordered Gerbasio out?
  - A Yes, sir.
  - Q And he complied?
  - A Yes, sir.

- Q And at that very moment a question was posed to Mr. Gerbasio?
  - A Yes, sir.
- Q He was not given his Miranda rights at that time, was he, sir?
  - A No.
  - Q And he answered the question?
  - A Yes.
- Q And after he answered the question you formally put him under arrest?
  - A Pardon me?
  - Q You put him under arrest?
  - A Yes, sir.
  - You told him he was under arrest?
  - A Yes, I did.

THE COURT: Go back on that and hit the preparation hard, before or after, if you will.

Make sure that Mr. Jules is answering the question you really want answered.

- G After the answering of the question by Gerbasio you formally advised him that he was under arrest; am I correct?
  - A Correct.

Q There is no doubt that you had him in custody at the time, however, when you had your gun pointed at him --

MR. LEVIN-EPSTEIN: Objection.

THE WITNESS: Not me.

- Q When your brother officer had his gun pointed at him and directed and ordered him out of the truck; am I correct?
  - A Yes, sir.
- Q Would it be fair to say, Agent Jules, that the words "You are under arrest" was a formality?
  - A Oh, sure.
  - Q Okay. There is no question --

THE COURT: And the Miranda warning was definitely after this first exchange?

THE WITNESS: Correct.

THE COURT: And right after the arrest?

THE WITNESS: Right.

THE COURT: The formal arrest?

THE WITNESS: The formal arrest.

MR. WASHOR: I'm not so sure, Judge, that the technicality of formal arrest --

THE COURT: Was he in custody for Miranda

purposes when all he had to contend with was Mr. Weztoff and his drawn gun.

MR. LEVIN-EPSTEIN: Yost.

THE COURT: Agent Yost and his drawn gun and Mr. Jules and his gun at the ready.

MR. WASHOR: I suppose that's a sufficient amount of custody.

THE COURT He was nearly in custody, I would think. He was in focus anyway, wouldn't agree?

MR. LEVIN-EPSTEIN: Absolutely, your HOnor,
There is no contest as to that point.
THE WITNESS: Correct.

- Q Were you present, sir, back at FBI headquarters when Mr. Gerbasio was questioned?
  - A Yes, sir.
- Q Were you present during the entire interrogation?
  - A Yes, both, right.
- Were you present at the time that Agent Yost, referring to the incident in Staten Island, before going directly back to the FBI, on the other side of the truck, the driver's side, when Agent Yost told the

objecting, I suppose the Court in the interest of justice will allow the reopening of the motion.

THE COURT: I'm afraid as far as discretion I'd better.

MR. LEVIN-EPSTEIN: It was an inadvertence on my part.

I will represent as an officer of the Court, however, as I have to, Mr. Washor, and I will ask it be marked now as Government Exhibit,

THE CLERK: Five --

MR. LEVIN-EPSTEIN: -- in connection -- excuse me, in sequence in evidence, if there is no objection.

MR. WASHOR: What is it?

MR. LEVIN-EPSTEIN: It's the rights form.

MR. WASHOR: What exhibit?

MR. LEVIN-EPSTEIN: Five.

THE CLERK: No objection, no Government's five in evidence.

(So marked.)

MR. LEVIN-EPSTEIN: Government's five in evidence. That both Mr. Gerbasio and Mr. Delucia

having been advised of their rights at JFK Airport in writing, waived them.

So that then I believe that the statements given by both Mr. Gerbasio and Mr. Delucia at the airpot certainly are admissible under the strict compliance with Miranda against Arizona.

THE COURT: I get that all right.

MR. LEVIN-EPSTEIN: Now, as to the statements that are given --

THE COURT: What I'm talking about are, where Westoff said that when he said to Mr. Delucia "Where are you going?"

MR. LEVIN-EPSTEIN: Exactly.

THE COURT: He said "Ask Angelo, I'm helping him."

And when Mr. Jules said to Mr. Gerbasic

"What are you doing in Staten Island?" He said

"Ask Mario. I'm helping him."

MR. LEVIN-EPSTEIN: Yes. The only reason that I addressed myself to the subsequent statement first is because the argument which I will pose to the Court does make more sense when it

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is argued this way, as I believe the Court will see.

I can understand the question -- the Court's question about these two threshhold statements, and I characterize them as threshhold statements as a matter of common parlance, not as a term of art, because I do understand the distinction.

There is no question -- and it is conceded by the Government -- that both Mr. Delucia and Mr. Gerbasio had not been advised of their rights under Miranda against Arizona or the subsequent cases at the time that they made these two statements.

It is further conceded by the Government that these two statements were made in response to interrogation, a question at least, if not a formal interrogation.

They were not in the classic case law sense spontaneous threshhold declarations. Otherwise I would be arguing that as an exception to Miranda.

> It is conceded that they were now. However, -

THE COURT: They weren't just things blurted out. You have got me, or --

MR. LEVIN-EPSTEIN: Right, exactly right.

Well, I won't characterize them as they weren't just blurted out; in one sense they were blurted out because I think they were placed in a very anomolus position in their point of view of suddently in my characterization being caught with their hands in the cookie jar, they were caught redhanded with the stuff, so they had to say something.

THE COURT: Well, they were caught either in flagrant innocence or flagrant guilt.

MR. LEVIN-EPSTEIN: That's exactly right.

But in any event, that doesn't go to the issue

of whether it's admissible or not, and I don't

think -- I don't argue that point.

What I'm saying to the Court is this
two statements by Gerbasio that he was with
Mario Delucia or Mario and by Mr. Delucia that
he in turn was with Angelo are, when compared
to the statements given after the advice of
right, substantially the same.

In other words, theywere statements in

which both of them went to the other somewhere for a reason or rationale for being present with this truck on that street in Staten Island.

Statement following the advice of rights under Miranda, I'm almost -- I'm willing to concede, your Honor, on behalf of the Government that these initial statements would not be admissble, because clearly there was no compliance with Miranda which I think there should there -- there should have been. I don't say that by way of criticism.

With the FBI, we were involved in a detailed surveillance, there was a question of stolen property, there was a long night of surveillance before and so on, and my remarks are not characterized to criticize the agency in any way, especially threse agents, who have had great experience in this area.

However, if the statements that were made at the threshhold were statements bare and alone, then perhaps the Court would be

correct in its discretion in not permitting their admissibility.

However, in light of the fact that the statement made following the Miranda warnings were in all material respects substantially exactly the same statements, any harm, any prejudice, any danger to them that they ought of their own mouths incriminated themselves when they had the right not to say anything, was neutralized, it was uncut by the fact that after they were advised many times, they said the same thing right again.

At a certain point, your Honor, I think the Court has to take cognizance, and I think the Court mormatively should take cognizance of the pragmatics of a situation such as this.

The philosophy, the rationale and in fact, the entire philosophy of the Supreme Court decisions following Miranda and Escobeda is that a person should not be compelled or even permitted to inculpate himself out of his own mouth without first being advised that he has a right under the Constitution to not do that, but,



your Honor, what -- at what point must we allow a defendant who has made an inculpatory statement to fall back on a technality in the sense that he wasn't advised -- and I say that guardedly; when that person, after being advised in a manner of speaking, -- shoving the statement down the law enforcement agent's throat.

THE COURT: Well, if I can suggest it,

I mean if the cat has already been let out of
the bag, then it's sort of, as a psychological
matter, on such an occasion useless to try
to get it back in the bag.

MR. LEVIN-EPSTEIN: Your Honor, I agree.

is is there an argument here on the very strength of your argument to say that since the later material went in essence no farther than the original statement, the later waiver is meaningless.

MR. LEVIN-EPSTEIN: Well, your Honor, my point is this --

THE COURT: You couldn't recapture

what had already been done.

By the way, notoby cares about a Bruton point here.

MR. WASHOR: Yes, oh, your Honor,
Judge --

MR. LEVIN-EPSTEIN: Perhaps we can handle one difficulty at a time.

And I am prepared to argue that as well.

MR. WASHOR: Your --

THE COURT: Let's do that.

MR. WASHOR: I have been sitting quietly in here not trying to create a problem.

THE COURT: Yes, I know, you have been sitting much too quietly.

If it was a Bruton case it should have been surfaced with Judge Judd at the very moment the situation popped open and it popped very early in the game, so let's --

MR. LEVIN-EPSTEIN: That's correct.

THE COURT: -- let's not talk about that.

Even the Government is entitled not to be surprised.

MR. WASHOR: Well, I think it will

depend on the ruling here, whether there is a Bruton problem or not.

Sometimes they are interrelated, your Honor.

THE COURT: All right.

MR. LEVIN-EPSTEIN: The Government is aware of the Bruton -- the potential of a Bruton situation here, your Honor.

In the meantime -- off the record I have never seen Mr. Washor pop out of a chair so fast, the magic work Bruton and you took off like a shot.

MR. WASHOR: I --

MR. LEVIN-EPSTEIN: Your Honor, I anticipated the Court's misgivings about that very argument; at least in the subjective opinion of the defendant himself that's a very real possibility, but not in this case.

As shown by the statement that was made, your Honor.

You will recall the testimony from the various agents that not only did they testify -- I beg your pardon, did the defendants make the statements about "Ask Angelo" or "Ask Mario"

but when they came back to the airport they made much more detailed statements, not inconsistent with the original statement, but fleshing out, if you will, the background to those initial statements.

Now, I submit, your Honor, that if these two defendats or either of them had been of the opinion, as the Court phrased it, that the cat was out of the bag, then there would have been confessions. They would have --

THE COURT: No, I mean that -- I mean you say something and you're stuck with it, you have got to stick with it.

MR. LEVIN-EPSTEIN: But they didn't have to speak afterwards. They didn't have to say anything else, and they were advised three times apiece that they didn't have to.

THE COURT: If you want to lend credibility to the statement that had first sprung out of them, --

MR. LEVIN-EPSTEIN: Well, your Honor, most respectfully -- I beg your pardon.

THE COURT: -- they had to elaborate

on it and bring in in Gilbert's wonderful phrase

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"The touch that makes anotherwise unvarnished tale replete with --"

MR. LEVIN-EPSTEIN: But, your Honor, to follow your analogy without being facetious, the way this operetta, as it were, unfolded was just as fictitious as Gilbert and Sullivan.

What we had here were two men, I submit caught redhanded. I submit that at this point -- of course this is an issue ultimately for a jury, should it come to that -- but we -- by way of this argument they saw, as it were, the handwriting on the wall. And yet they made what we submit, and will argue later at a more appropriate time, are false, exculpatory statements.

The same false exculpatory statements in different words, and as you phrase, embellished and perhaps fleshed out or added with the details to lend that touch of detail of which you spoke, were they -- after they were advised of their rights, not once, not twice, but at least in one case, Mr. Gerbasio's, three times. Andtwice as far as Mr. Delucia is concerned, that the record will show.

Now, if either or both of these defendants had felt that their defenses were down, the jig was up, the cat was out of the bag, or whatever cliche is most appropriate, I submit they would not have continued with what we again at an appropriate time will argue was an even more detailed embellishment and insidious, false exculpatory statement by each of them at a later time.

They didn't think that the cat was out of the bag and they should not now be allowed to rely upon the fact that they made a one-line statement each before their advice of rights, in order to bootstrap the selves out of having that used against them.

They have themselves undercut and neutralized whatever prejudice or taint might have accrued to them by making a statement right again after having been advised of their rights numerous times.

And I would argue as a matter of law that anything of logic that we should not close our eyes to human nature and common sense

and thereby permit guilty parties to escape or elude the use of their own admissions, which, of course, is well recognized are some of the forms of evidence against them, and false exculpatory statements, some of the strongest forms of evidence against them in this case and others, from being used against them.

And that, basically, is the argument as to the initial statements.

(Continued on the next page.)

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As to the subsequent statements, your Honor, the Government fells that --

THE COURT: That unless they are tainted by the first disclosure they -- then you think they are solid as a brick foundation.

MR. LEVIN-EPSTEIN: I wouldn't even go
so far as to say that, your Honor, in terms
-- unless they are tained, I say they are solid
as a brick foundation.

THE COURT: Anyway --

MR. LEVIN-EPSTEIN: Right. However, if the Court -- well, withdrawn.

Now, as long as I'm up here, perhaps I can address myself to the Court as well --

THE COURT: I would like to get on with the rest of the case.

MR. LEVIN-EPSTEIN: Then I'm completed with my argument unless the Court wants --

THE COURT: Yes, you may wish to reply.

MR. LEVIN-EPSTEIN: Very well, then I will sit down until Mr. Washor and Mr. Schacher havea chance to make their remarks.

MR. WASHOR: Your HOnor, I think that it's important to look at the statement, the

substance of the statement, A, in making a determination as to whather or not --

THE COURT: You mean this is the later statement made at the FBI office?

MR. WASHOR: Yes. I think it's important to have the content of that statement.

THE COURT: Well, let me see it. Is that in evidence?

MR. WASHOR: I don't believe so.

MR. LEVIN-EPSTEIN: I'm sorry, your Honor, quite frankly, I didn't hear the remark.

MR. WASHOR: The statement of the defendant Gerbasio, would it be fair to say that it's covered in this 302 substantially?

MR. LEVIN-EPSTEIN: May I see it?

MR. WASHOR: Without haveing to resort to having each witnesses' recollection?

MR. LEVIN-EPSTEIN: Oh, no, your Honor, I will stipulate that, as Mr. Washor says, substantially the statement that Mr. Gerbasio made after he went back to the airport and was interviewed there is substantially contained in this report of Mr. --

THE COURT: In 3500- whit?

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MR. LEVIN-EPSTEIN: I'm not even sure it's marked 3500 material, your Honor.

THE COURT: Then how did he get it?

MR. WASHOR: By the graciousness of the Government.

THE COURT: Oh, the earlier discovery.

I see.

MR. LEVIN-EPSTEIN: No, your Honor, that was provided under Rule 16.

MR. WASHOR: This will be used if you wish.

THE COURT: May I see it?

MR. WASHOR: Yes, surely.

I suppose, your HOnor, it takes but a moment to read.

THE COURT: Well, I'm a slow reader.

MR. WASHOR: I just want to prevent speaking while you're reading.

THE COURT: Indeed, at times my children tell me I must be moving my lips.

That's certainly a two-edged sword, isn't it?

MR. WASHOR: Yes, your Honor, as I view the issue, the first instance, the state-

ment at the time of custody, was violative of the Constitutional right of the accused Gerbasio.

The more important issue is whether or not there has been a sufficient taint to destroy the written consent form that demonstrates on the surface only, the knowledgeable waiver of a Constitutional right relative to the second statement contained in the 302.

The Court seemed to hit the issue on the head when you referred to letting the cat out of a bag.

There seems to be no point to the exercise if on the one hand there is a buttressing of the original statement, and the original statement is obtained in violation of the accured's rights.

of a time period involved in this case whereby the accused can been said to have meditated or thought about all of the facets that should be thought about before an individual knowingly, willingly can sense and what his Constitutional

right is.

Interestingly enough, the Court recognizes that the statement that is made back at the FBI office, in a sense could well be categorized as a double-edged sword.

But in a sense it does corroborate

the initial remarks or statements of the accused

Gerbasio.

And if this matter were to be buttressed by other evidence, which the Government is aware of, you will find some of the following factors from the testimony at the hearing.

Gerbasio is seen at or about eight A.M. for the very first time, and he is the passenger in the truck. He is not seen touching, handling the rear of the truck or loading the truck.

There is no direct evidence to indicate at this point participation other than helping the co-defendant.

even if accepted as probatively true, given the double-edged sword concept, is nothing more than the cat out of the bag, for this is

in essence what he said at the very moment of "Where are you going" or "What are you doing" Gerbasio replied, having no idea of the benefit of the Constitutional rights, with gun pointed at him and FBI surrounding him "If you want to know all this about the whole thing, you ask Mario, I'm just helping him"

So the second statement in the-- in time and in substance is a reiteration, Angelo's attempted explanation of the very first comment of Gerbasio when confronted in State Island.

It's the classical circumstance of the cat out of the bag. How do you prevent the explanation at the FBI office merely because a form is given to him, a form is signed?

This is not an admission against interest standing by itself. You see, the Government clearly argues to the Court that had this Constitutional --

THE COURT: Well, no, because you see, the two of them taken together establishes either a conserted if innocent action or a conspiracy of guilty action, but concert they do establish.

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MR. WASHOR: Isn't there a third alternative:

One is telling the truth and not the other?

You see, I don't mean to be unkind, but -THE COURT: Neither one is free to say
"Oh, well, I was lying."

MR. WASHOR: But they may be able to protest their own innocence.

In other words, notwithstanding --

THE COURT: No, what I mean is that each of these statements when made, is not necessarily a protestion of innocence.

What is really is is a statement of complicity in something that is either good or had, but a statement of union of action it is in each case.

Each man said "I'm helping the other."

Now, I think in terms of count two that makes that a critical part of count two, if we're dealing with a concerted action addressed to wrongdoing.

If we're dealing with a concert of action relating to innocent transportation of

merchandise, then it's a concert in rightdoing, but a concert it is.

MR. WASHOR: You see, I have a vew as you're discussing this that assuming Gerbasio by himself were subjected to the admissibility of this statement, and assuming the Court would not for reasons -- legal of course -- but you would not permit or no statement was made by the defendant Delucia, I would be hard pressed to believe that the Government would tender this statement of Gerbasio in evidence.

You see, the physical facts that we know now, that we now know at least curiously because of the hearing, demonstrate Gerbasio not being present at the loading.

THE COURT: No, let's look at this way:

Suppose that the only evidence of any moment that the Government had was evidence tendered through, let's say, to keep it a little touch, evidence from Mr. Simon, that the only one ever spoken to was Delucia; the Government would still want this statement of Mr. Gerbasio's on the theory that well,

notionally, and not talking about per proof,
he said he's helping Mr. Delucia and Mr. Simon
tells us that Mr. Delucia was engaged in an
acknowledge theft, and here you have the
other man saying I was helping him, helping
him what, helping him in what he was doing,
so see whether or not Mr. Delucia has said
a word, Mr. Gerbasio's statement would
still embarass him if the Government made a
case against Delucia.

MR. WASHOR: I see the point. The point is absent the statements of the two accused veritably pointing their fingers at each other, developing this criss-cross.

THE COURT: The cartoon again. "It was he."

MR. WASHOR: "I must not tell a lie.

It was the other party that did it."

Be it as it may, absent that factor,
you now have a different circle relative to
whether this really constitutes an admission
against Gerbasio by Gerbasio himself or whether
it constitutes some form of evidence --

admissions, just words that came out of his worth. That's really all we're talking about at the moment.

MR. WASHOR: I don't really mean the legal definition of admission.

Now, these words flow most naturally, whether, as the Court indicated, they were caught in flagrant guilt or flagrant innocence, but they flow naturally from the original statement.

THE COURT: All right, now who has a case on this?

MR. WASHOR: I suppose that, your Honor, from the standpoint of taint and from the standpoint of cat out of the bag, there are innumerable cases. I will get them for the Court.

I should be able to get at least one.

The cat out of the bag theory is anything
but novel.

Whether or not the Court will see fit to allow the facts of this case to fall within

don't fancy seeing it moved until we get a warrant to seize it." I'm afraid common sense compels one to agree that a charade of that sort is empty of Constitutional protection.

Now, here I don't think you could say with assurance that a magistrate would feel free to issue a warrant to seize what? Nobody knew yet because Simon hadn't said "They are going to take those low value, relatively low value, Taiwanese coats."

MR. LEVIN-EPSTEIN: Not that it makes a point, your Honor.

THE COURT: -- Rather than some plat-

MR. LEVIN-EPSTEIN: Not that it makes a difference, but they are not low value.

THE COURT: Well, whatever they are they are not platinum.

MR. LEVIN-EPSTEIN: No.

THE COURT: So what would he have them seize? I mean at the moment, when there were enough data assembled to authorize the magistrate to issue a warrant, it was already too late, the theft was in progress, the goods

were in motion and it was time to prevent the perpetration of the completion, successful completion of the transportation.

On these grounds I would deny the motion to suppress the merchandise as evidence.

Now, the other one I wish you could find a case on --

MR. LEVIN-EPSTEIN: If the Court wishes

I will take some time --

THE COURT: I'm attracted to parts of
Mr. Levin-Epstein's argument. I think that the
pre-warning statements are out except under
U.S. against Harris, and that if the witness
takes the witness stand he can be informed
to eat that.

MR. LEVIN-EPSTEIN: In a manner of speaking.

THE COURT: Yes. So I think the real issue is simply -- because I don't think that you can get authentication or admissibility by ratification, as it were, because I think that the genius of Miranda, if you have one, is in the warning and as long as it's with us it still is what it's all about.

So here I think it could only come back to explaining to him if someone takes the witness stand and gives a plausible explanation of yesterday what he said --

MR. LEVIN-EPSTEIN: You're speaking of the first statement now?

THE COURT: Yes. If there is a plausible explanation of yesterday what he said to the FBI office, then he could be confronted with "You also said, the first words out of your mouth." But whether his having said it is sufficient to taint the other is the problem which we deal with, and I think I would appreciate a moment to find out whether or not someone can think of a case on that.

MR. LEVIN-EPSTEIN: May we be of some assistance to the Court in the Court's recess and submit memoranda of law on the subject?

THE COURT: Well, I'm thinking in terms of our openings.

MR. LEVIN-EPSTEIN: Well, I would like to have a ruling on this prior to the time that we open to the jury, of course.

THE COURT: So would I, that's why I --

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MR. LEVIN-EPSTEIN: We're going to argue it on a contingency basis, your HAnor, I think there is no problem with that, if the Court wishes to hear argument on it.

THE COURT: Well, I mean what is it that --

MR. WASHOR: Let's assume the statements are admissible. Otherwise if they are not admissible --

MR. LEVIN-EPSTEIN: It's academic.

MR. WASHOR: Well, it's not completely academic but it's academic on the surface.

MR. LEVIN-EPSTEIN: I think it's completely academic.

MR. WASHOR: Not necessarily.

You have defendants take the witness stand too.

MR. LEVIN-EPSTEIN: Then Bruton cannot become an issue at all.

MR. WASHOR: It depends. If only one takes the witness stand --

MR. LEVIN-EPSTEIN: Curious and curiouser.

MR. WASHOR: Be it as it may, can't we discuss it at this moment, because I'm perturbed

about it.

THE COURT: Only if you move quickly.

MR. WASHOR: At the inception the Court must recognize that both of the defendants sought my office's aid, at the time of the revelation of the material it was quite evidence that there is a legal conflict that exists between two accused, two wit, the presence of Mr. Schacher.

Now, during the course of preparation of this case for trial, whether or not there is going to be a Bruton issue, whether or not the statements would be admissible has always created a problem.

Assuming that the Court were to hold

the statements admissible in evidence, if both

of the defendants were not to take the witness

stand, or in the alternative anyone of the

defendants were not to take the witness stand,

and then the last couple, if the Government

were to argue that the statement of the defendant

that did not testify is a false, exculpatory

statement demonstrating the existence of a

conspiracy between the two accused and their knowledge of the contents of the truck, then you would have a Bruton issue.

I think the Bruton issue in this case only raises its head when and if the Government argues that each statement as false, so as to pit it against each other.

If they do not take that position, I

do not see a Bruton problem, but if they

offer these statements to demonstrate that

Delucia said "I was helping Gerbasio" and

Gerbasio said "I was helping Delucia" therefore

both -- well, in a sense I guess they could

be helping each other, but the alternative of

both statements is "I know nothing about what

is illegal, I am just here to help."

If that's the position --

MR. LEVIN-EPSTEIN: Sorry --

MR. WASHOR: -- that will be argued

by the Government in a sense, and neither of

the accused take the witness stand, or any one

or the other does not take the witness stand,

then -- then you have got the Bruton problem

because that argument deprives one defendant

that does not testify of being swept in with the statement by a co-defendant, such as Bruton has declared, and, of course, there is not a legal scheme that is prepared by counsel to create a problem that does not exist.

I can tell your Honor most candidly

even as of this morning the issue as to whether

or not there would be a defense by Garbasio,

a defense by Delucia is still very questionable.

And I say that candidly. Because there are certain problems that confront the defense.

THE COURT: The defense in chief?

MR. WASHOR: Yes, there are certain problems that we're confronting in the defense that prohibits of from being able to intelligently advise the Court as to our position.

Now, I have read some of the cases relative to Bruton and I know how they would like to have it done. How did -- how they would like to have it done as early as possible and set this matter down, so that we don't run into the problem during the course of the trial.

The only problem is in order to have

the Bruton issue resolved, Mr. Schacher or Mr. Washor, myself, would have to take a position that my defendant is not going to testify under any circumstances, and I can't say that to your Honor in candor.

And I understand Mr. Schacher will not be able to make that statement at this point.

MR. SCHACHER: Not at this point, Judge.

MR. WASHOR: Now, there is our major problem.

That's the reason that it was not created or raised, rather, at an earlier time.

MR. SCHACHER: Before Judge Judd.

MR. WASHOR: He was the only other judge, he knows that.

I think we have a serious problem depending on the way the Government intends to label the statements.

MR. LEVIN-EPSTEIN: May I be heard, your Hwnor?

First of all, I think the Court's initial point when it raised -- and I make a point
of emphasizing that it raised the ugly head
of Bruton initially in the only proceeding

that has ever been had in this case, not counsel, the first time that that "Ugl; head" was raised was long after it had proposed for pre-trial motions such as a motion for severance.

Secondly, on that basis -- and first of all, on that basis alone there should be no cognizance of a motion to sever under Bruton.

However, even if the Court wishes to in the interest of justice, or for whatever other reason, because, of course, the Court in its discretion can hear a motion to sever at any time, in its discretion, -- it's not advised by the decisions and it's not countenanced by most of the decisions but the Government recognizes the possibility, if not the likelihood.

In any event, should the Court wish and desire to exercise its discretion and entertain either a motion for severance or argument under the issue of the so-called Bruton problem, the Government would argue to the Court that under recent decisions of the Second Circuit

there is no Bruton problem here; specifically citing to the Court -- and I don't have the numerical citation, it will be provided to your law clerk as soon as I can get upstairs -- but United States ex rel Stanbridge, and I forget the name of the respondent in that habeus corpus proceeding --

THE COURT: The Warden?

MR. LEVIN-EPSTEIN: Thank you, your Honor.

It was clearly held and has been held many times since Stanbridge, although that's a recent case, that if the two statements, one of the defendants in this case Delucia and others by Defendant Gerbasio, are so congruent that they become interlocking in nature, I think as the phrase used in STanbridge, that any onus attached under the doctrine of Bruton disappears.

It is neutralized. And in fact, there is no prejudice which accures. And in fact neither or both of the defendants in such a situation can claim foul, because neither one is being deprived of the exact point provided for by Bruton, and that's the right of confrontation, for he himself without the assis-

tance of his co-defendant has put nimself inside.

Now, whether or not the Government characterizes the statement as false, exculpatory statement, a confession, an admission, and inculpatory statement, whatever it is makes no difference, because the point is that, you know, without again being facetious, a statement is a statement in this sense, that if it's used to prove guilt then if it's relevant and it doesn't form some Constitutional prejudice, it's admissible.

(Continued on the next page.)

Now, the fact that it may be a false, exculpatory statement or they may be false exculpatory statements --

THE COURT: Well, to Bruton we're interested only in whether it is accusatory.

MR. LEVIN-EPSTEIN: Exactly. Exactly the point.

The Court has pointed out --

THE COURT: And the reason I thought of Bruton was that each of them is at least prima facie intended as an off-loading statement.

MR. LEVIN-EPSTEIN: Exactly.

THE COURT: So that it is purely accusatory, or at least intended to be purely accusatory.

MR. LEVIN-EPSTEIN: But it doesn't go
the full step, your Honor, it doesn't actually
accuse.

In other words, actually, Mr. Gerbasio -THE COURT: No, he says he was helping
him, I leave him to stew in his guilt or sorry
in his innocence.

MR. LEVIN-EPSTEIN: So some implicit

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threat, accusatory nature of the statement and I don't contest that.

in offering evidence when it's offered. But it is not the classic Bruton situation where hypothetically Mr. Gerbasio says "I'm innocent" and points the finger of accusation at Mr. Delucia and says he did it.

In fact, it's not even the classic -
THE COURT: See, they are about to say
stop right there, we disagree, that's the basic
nature of it, because each man means his FBI
man to infer that if there is any wrongdoing
here --

MR. WASHOR: It's not me.

THE COURT: -- it's not me. It's my partner, not me.

MR. LEVIN-EPSTEIN: It's the other guy.

But that's not Bruton, because in Bruton
-- pardon me -- because in Bruton at least
classically, recognizing the need for flexibility.

THE COURT: See, we -- with each one electing the other ringleader, for good or evil.

MR. LEVIN-EPSTEIN: That's Bruton.

In other words, both of them have made inculpatory statements and one names the other or both name each other. If both name each other in an inculpatory situation under Standbridge both statements come in and Bruton is neutralized and that's what we have here.

MR. WASHOR: Your Honor, may I answer that?

THE COURT: You can try.

MR. WASHOR: I am well familiar wi the Stanbridge case, too much with it. And I have read it so many times I'm starting to understand it.

And I am not being facetious. My understanding of Stanbridge is when the statements are interlocked, you are not going to be able to use the Bruton issue and the right of confrontation when two and/or more people have made statements that interlock each other into the commission of a crime. We don't have that here.

We just have the opposite of interlocking.

You see, if you bifurcate the statement for

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a moment, the fact that I'm just helping, while in a sense it could be considered to show participation, I don't know, at least for the purposes of possible elements under the conspiracy charge, the real Bruton problem is not that I'm just helping, but you want to know what really went on, and if there is any wrongdoing, ask the other fellow.

"I just arrived at eight o'clock in the morning. I got up from my bed at night, in the morning kissed my wife goodbye and came to work and Mariosays help me and so I helped him. What do I know about stolen goods, what do I know about any improprieties, I wasn't there?"

That's one form of it. There is no interlocking when the co-defendant applies the same theory in saying tha 'I knew nothing about this, what did I know about it? The defendant Gerbasio came to me and says Come on, let's take this truck, we're going to steal. He says you drive, because I am a little tired, so I got behind the wheel."

EAch individual sidestepping that whirlpool but making sure that they know that if

there is some impropriety the Government's got to have a little taste, so you might as well get him.

In other words, I must not tell a lie, it was George Washington that cut down the cherry tree. You can't by virtue of the statement, they are not interlocking, they are diammetrically opposed to each other, as proof positive that they are opposed to each other the Government has demonstrated that they will proffer those statements, pitted against one another, to demonstrate consciousness of guilt on both parties.

MR. LEVIN-EPSTEIN: That's not the basis of the false exculpatory statement. The basis of the false exculpatory statement is, first of all, the statements will be proven to be false by extrinsic evidence.

Next of all, your Honor, I think that

Mr. Washor discerns at least one part

of Mr. Gerbasio's statement, in which he says

to the FBI agent "Mario approached me to help

him, but then Mario told me 'Don't tell anybody

about it.'"

MR. WASHOR: Right.

MR. LEVIN-EPSTEIN: Tothat extent, your Honor, it shows consciousness of unity, it shows conspiratorial conduct, it shows consciousness of and awareness that each other is involved, and it also is interlocking under the Stanbridge document and the subsequent cases.

MR. WASHOR: Your HOnor, I don't see
Angelo Gerbasio's statement alone.

THE COURT: All right, let's see what we can find about it.

MR. LEVIN-EPSTEIN: I beg your pardon, your HMnor?

THE COURT: Let's see what law we can find on that between now and noon.

MR. LEVIN-EPSTEIN: On Stanbridge as well? On the Bruton as well?

THE COURT: We might as well.

MR. LEVIN-EPSTEIN: Okay.

THE COURT: But primarily on other -the other one because, as you say, the other
one is threshhold.

MR. LEVIN-EPSTEIN: Very well, your Honor.

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with the fact that that statement, if that was all that was at issue, would not be admissible because of a violation of the Court mandate and the Pifth Amendment requiring Miranda.

We do have, however, Miranda warnings being given at a subsequent time and place in close proximity to the original statement, and we do have subsequent forms demonstrating at least prima facie a waiver of rights.

The issue, as I see it, is there, firstly, the second statement and the first, second, are they in the pare delictu — to each other, part and parcel of the same thing.

Secondly, has there been attenuation from the standpoint of time andplace so as not to allow any original taint to spill over to the second?

THE COURT: Well, I suggest that maybe the analysis is to start with the second one, since the first one is out and discovery, whether or not there was a conscious, deliberate waiver of the Constitutional right to be violated and to proceed without the assistance of counsel.

Now, if that decision was made, it comes in notwithstanding that there may have been an earlier statement that was the equivalent of the later one.

The real question is in one sense whether the first statement introduced the second, if you want to put it that way, produced the second, or the fact of its having been made was necessarily or on the evidence such a factor in the mind of the person being asked to waive so that you could no longer say that his decision to sign a waiver and speak was a completely intentional waiver of an important Constitutional right.

And from that point of view I don't think we're talking in terms of whether one bit of evidence led the Government to other things.

It's different from that, because I think what we're really concentrating on is how free was the will of the actor at the moment when he agreed to speak?

MR. WASHON: State of the defendant.

THE COURT: Yes. I mean as manifested

by his signature, subsequent statement.

MR. WASHOR: Well, in answer to that inquiry ---

THE COURT: Now, who has the burden of proof?

MR. SCHACHER: The Government has.

MR. WASHOR: I believe -- well, it's --

MR. SCHACHER: No, the Government has.

MR. WASHOR: Don't'be too sure.

They have demonstrated with -- a written waiver.

The fact that we raise the issue on the argument, I'm not so sure where the burdenof proof is to demonstrate. I do know this: It is my candid opinion that on the question of waiver, the Government must establish clear and convincing waiver to the Court's satisfaction.

THE COURT: I suppose yell could put it this way: That when the Government has a statement it must bear the burden of proving that it was a free and voluntary statement.

MR. WASHOR: Then I will wait until my adversary is finished.

THE COURT: They have established that at lesat from the point of view of compelling you to come forward with evidence, I suppose, when they show a signed waiver witnesses by two people, et cetera.

And the defense then puts the ball back in the Government's court by showing that, well, in the language of the cases I find the cat was out of the bag, so, of course, you have got the waiver.

You already had the confession, so the waiver was meaningless. I'm not sure that burden of proof analysis help us to much.

But here it seems to me that one thing we have is that the time sequence was pretty close.

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The first declaration was made sometime after 8:45.

MR. LEVIN-EPSTEIN: Approximately 9:30 or nine in the morning, your Honor.

THE COURT: Yes, and the other one was made --

MR. WASHOR: Ten to five.

THE COURT: -- ten to five, ten-eight, ten-ten. Somewhere in there.

So from the defendant's point of view that is a nice close coupling.

MR. WASHOR: Twenty minutes or so.

THE COURT: If it had been two weeks it would have been great from the Government's point of view.

The second factor is what was the nature of the first statement -- occasion. Was it a long drawn out, no food, no fire, no drink, no cigarette, no nothing until finally the fellow bled a few words into the air of the Government and was asked later to repeat it and with a shaking voice he goes over it again. That's not this. That's the clearcut case of the red end of the spectrum.

Now, how far are we toward the violet end?

Now, here on the evidence both of these were statements which came right out. The parellelism of the language, if one were suspicious-minded enough, would almost suggest

pre-arrangement, but I don't think one can infer that from that it was made traceable to recollections of particular words used are never that sharp, but what is clear is that what was said was said not simultaneously, if, as Mr. Levin-Epstein conceeds, but promptly, without urging, and in a way while at first blush you would think to yourself "Well, one of them is lying," then at second or third blushes it gets very different, second blushes "Well, they are both telling the truth; the only question is are they both guilty," because not both of them necessarily are incumbatory, because if one hoodwinked the other andinvoluntary process is -is like the mailman who is never quilty in the mail fraud case just because he del'vers a letter. He certainly does it, he hands it right to the victim, but he's innocent as he can be.

Your third though is "Well, by George, they could both be innocent and Godoy and Simon be people who were setting them up."

So you really have it all right there.

And then it seems to me an oddity here

that there is no suggestion -- and I think interrogation brought it out -- that both men were in effect given the business together by the FBI or that one was used against the other or that the waiver was in any way an extorted waiver.

There wasn't much time to mature the thought.

Remember, we have to keep in the back of our minds the idea that just because the Grand Jury thinks so, we are not compelled to think that somebody must be guilty around here, nor are we compelled to think that just because there was a deviation, if you want to call it that, that it necessarily was by one or both of these men, whatever else there may be.

That when they do come out with the long stories that they do -- well, one I read is not particularly satisfactory because it leaves so much to be explained, and as I indicated, quite apart from its being falsely exculpatory, in the light of some of the evidence that we have already heard, could get the man into trouble because it does show willing cooperation in something that looked like at best an

irregulating in movement -- at best, and the willing cooperation of either or both in what was at best an irregular movement is pretty accusatory, and leaves much to be explained.

factors, and the sense of the cases as

I grasped them hurriedly is that you don't
automatically assume that if an early disclosure produces a later disclosure that you
can ever lay out of view the possible influence
of the early disclosure on the later disclosure
on the validity of the waiver on the disclosure.

So I think that's the precise area within which the issue has got to be decided.

MR. WASHOR: Talking about the state of mind of the man under the circumstances, I think it reasonably apparent we can only turn to the facts of the case, not that which may be known by both sides, not before the Court, quite obviously.

We have got a circumstance, a state of mind, at least of Gerbasio at the time of the questioning on the street in Staten Island, that

there need not be any really detailed explanation of a reaction, with the weapon and the FBI and everything occurring as it did, and the direction to get out of the truck, and the immediate questioning.

What is interesting to me -- and I had throught of this while we have had the recess -- is that the -- that Agent Yost, within a frame-work of probably three, four or five minutes at the very most, advised Gerbasio a second time, still in the street on the other side of the truck.

Now that was not developed to its fullest extent, but if my recollection is accurate, when he brought him around from the passenger side to the driver's side just prior to getting into their unbarked vehicle to head back towards the FBI office, I believe Yost said he told him again, or mentioned to him again, "You don't have to say anything, don't say anything," wo as to that effect, which would indicate possibly by inference the state of mind of the defendant Gerbasio of having in some manner or

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form demonstrated a desire to continue to speak.

MR. LEVIN-EPSTEIN: Or on the other hand --

MR. WASHOR: Albeit --

MR. LEVIN: I'm sorry?

MR. WASHOR: Albeit no reason to give him that protracted advice minutes after he received the full Miranda warnings on the other side of the truck.

Be that as it may, I'm only bringing that to the Court's attention to demonstrate the state of mind of the defendant. And now having verbablly stated that "If you want to know anything about what we're here for or why we are here ask Mario, I'm just helping him," you find yourself in a position that there are many inferences and innuendoes that can be drawn from that type of statement, reasonable inferences, I'm talking about.

The explanation in somewhat longer detail, but not much, quite obviously, back at the FBI office twenty or twenty-five minutes later, while not complete itself, and leaving a good

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deal to be explained if it should ever come to pass that it requires explanation, is just a culmination of the original disclosure. And I use the language of culmination of the original disclosure because I have found that in the case law, more particularly in United States against Robinson, cited 1973, District of Columbia, 439 F...2d. 553. It was an involuntary statement that was made -- that is declared to be involuntary, violative of the defendant Robinson's Constitutional rights.

The second statement that appeared at a time subsequent to the first, obviously, was a continuation, and the Court reasoned that the culmination of the purpose of disclosure the second time around was a continuing circumstance, as demonstrative of how far the courts have gone to concern themselves with the state of mind,

I have a Supreme Court of the United States decided in 1975, Brown versus Illinois, 95

Supreme Court --

THE COURT: That was a search and seizure case.

MR. WASHOR: Well, your Honor, I thought Brown against Illinois was search and seizure until you reread it. It's as much a Miranda case as it is search and seizure.

THE COURT: That's the second phase, certainly.

MR. WASHOR: Well, the second phase is the phase I'm concerned with regarding how far the courts have reasoned out that the state of mind of an individual has to be looked into with great scrutiny before we're going to say there is a proper waiver of Constitutional rights.

Now, Brown, there was admittedly or at least by decision an illicit search. The product of the illegal search violative of the 14th Amendment was shown or demonstrated to the accused.

It is the state of mind of the accused, Brown, when he seized the evidence knowing it to be seized, whether legally or not is unimportant at that point, but he seized the fruits of the crime.

What is his state of mind when he seized

it? Notwithstanding even the giving of the Miranda warnings they said no free and voluntary waiver.

THE COURT: Yes, you see, but here -
MR. WASHOR: In other words, the Court
reasoned --

THE COURT: The trouble with Brown is simply that here the visualization goes the other way around. I am satisfied that the search and seizure were entirely proper.

Now, if these are in fact stolen goods, if the Government is able to prove that and there is enough evidence of that for the seizure and arrest aspect at this point, then the situation was one of men driving a motor vehicle full of stoler goods, one or both or neither nothing.

And then they are asked the questions that they are asked as to -- Delucia is asked where are you going? He says "Ask Angelo, I'm helping him." And according to Mr. Yost Mr. Gerbasio was asked or instructed "Give us papers for the truck" and the says "Ask Mario, He has them" and/or as Mr. Jules heard it, "What are you

doing in Staten Island?" "Ask Mario, I'm helping him" or whatever.

There we have the total situation. I suppose in way it didn't make any difference what the men said.

MR. WASHOR: Except, your Honor, you are considering both statements actually at the same time. And I think that is causing one of the major problems -- at least it is in my mind -- because each statement made by each defendant should be analyzed independently of what, if anything, was said by the other defendant.

THE COURT: Oh, yes, I agree on that.

(Continued on the next page.)

MR. WASHOR: Now, there is no question that the agents for the very first time saw Gerbasio sometime early in the morning, around eight, there is no question that the description of Gerbasio was not conveyed to any of the agents related to being involved in the theft.

And you have him as a passenger in an automobile, and apparently state of mind, as one might reasonably infer in the circumstance on the street. No indication that in any manner or form that he participated in getting the goods from the inside to the outside or back on to the truck, so he makes a statement that standing by itself, without any concern of the co-defendant, incomplete as it may be at either stage, in the street or in the FBI headquarters, subject to explanation or innuendo, but purports to even back up a certain amount of truthful facts as demonstrated by the Government's own observations and surveillance.

Now, you would be hard pressed to try to reason out why he made the second statement when

he already made the first statement, except
that having put himself in a position, assuming
arguennedo that the first statement is made
voluntarily even, "I don't know anything about
this, if you want to know what it's all about
or who has the papers or where we were going
ask the co-defendant."

Once that is said his only other position that can be taken, or three positions, would be back at the FBI office "By the way, fellows, I lied to you." That's a position.

THE COURT: No, I don't think that's an important thing. I mean I think the important thing is whether at that point he --

MR. LEVIN-EPSTEIN: He could have said nothing.

THE COURT: -- should I be silent or should I talk?

MR. WASHOR: How could he be silent, Judge?

THE COURT: Because he could developed the thought "I have got myself in deep enough, I'd better shut up until I talk to my wife and

my lawyer."

MR. LEVIN-EPSTEIN: They certainly told him to be quiet enough times.

MR. WASHOR: The problem being that he without the benefit of knowing what the agents knew or what the agents had done, had already taken a position.

Why should he --

THE COURT: You see, what you are saying is that if he wascompletely innocent he wouldn't hesitate to go on, waive and talk.

MR. WASHOR: No, no, I'm not saying that it's a question of innocence or guilf because, yousee, then that's a double-edged sword.

THE COURT: Take the assumption of innocence for the moment, he would gladly waive if he was innocent --

MR. WASHOR: I can't --

MR. LEVIN-EPSTEIN: Although it's conceded that there is no obligation upon him to make a statement to convince somebody of his innocence.

MR. WASHOR: Judge, I don't think that the mere fact that a man in his own mind or

heart feels that he has not committed a crime is a basis for saying "Look, I don't need a lawyer, I will tell you exactly what happened."

THE COURT: No, but he would be the more willing to talk.

MR. WASHOR: I'm not so sure.

THE COURT: Because -- well, theoretically you're quite right, you can't be sure.

MR. WASHOR: You mean practically. Practically I appreciate what you're saying.

THE COURT: No, practically I think it's a little bit different.

MR. WASHOR: But how could he know at that FBI office, within a period of twenty minutes, and this wasn't a question of they soft soaped him, it's quite evidence.

While there was no passure in the one strain, but he was not also coddled like a little babe out of the wood, he was surrounded, guns had been pointed at one point, he was under arrest, he knew that he had a problem because he was told he had a problem, whether he knew he had problem, because he was guilty or he had a problem because he was guilty or he had a problem because he was at the right place at

the wrong time, by the wrong circumstances, it's unimportant, he knew he had a problem. And he had already told these people in sum and substance by inference, by a mere statement, "I have nothing to do with this, I don't know enough about this, you want to know anything, ask him.

I'm just here helping him."

THE COURT: No, I don't think that meets the issue.

MR. WASHOR: It's the second statement that just attempted to elaborate slightly, and it's not even much of an elaboration.

You see, it's not a detailed account of exactly what time I came to work, who I met, what I did, why I was here with the specificity to say that given state of mind he decided to waive his rights, and try to get out of the problem that he had.

His statement to the FBI, the detailed second statement, is really not of greater import because all he told them is what they already knew, intelligently enough.

MR. LEVIN-EPSTEIN: But, your Honor, that's exactly the point, because had it been

a situation where Mr. Gerbasio had felt, as the Court and other Courts have phrased it, the cat was out of the bag, or the jig was up, or whatever, then according to Mr. Washor's argument he would have given up all hope, he would have given up all hope of ever having extricated himself from this web of guilt and innuendo ir which he placed himself by his voluntarily given first statement, and he would have given up the story. But that's not what he does, what he does is he makes — as Mr. Washor characterized it, the barest bones statement, fleshing out barely what he said before.

The has been no taint because of the original statement. In fact, by his own choice, by his own election he has merely done what, as Mr. Washor has characterized it, any person caught would do, he's trying to make himself more credible. And that's not taint.

MR. WASHOR: The taint exists. It's just a question of whether it carries over. The taint is there. The statement being made upon



the question being asked in colation of the Miranda rights.

THE COURT: No, what you're really saying is having said what he said the first time around, each man, was there anything in that that would have in effect made him feel when they got back to the office, to use exactly the language, well, I have told you my story already, there is no point in my stopping now.

I think when he goes hack he genuinely has the very thing that the detail of the Miranda warning gets to him. He's in effect told you "Now, listen, don't be a blabbermouth, this is for keeps, you are in trouble, you are under arrest."

Now, do you want to talk? And remember that any time you feel yourself getting in trouble you can blow the whistle on the talking, you can get yourself a lawyer.

They start out by saying "You have the right to remain silent." They don't say to him in this warning or otherwise "Well, you let the cat out of the bag so you might as well

sign this."

What they say is "You have the right to remain silent" and perhaps we can look at the FBI men's point of view: They are probably totally unsatisfied with what they had heard. They have -- they may have been acute enough to have imagined that -- well, they both said essentially the same thing, so that we have got perhaps what we need here."

No, each man has said -- and they maybe tried separately for all anyone knows, because one may have been a wiress against the other for all they knew at that point -- "It isn't much, all he said is something pretty colorless, because he doesn't say "Yes, I know the truck's loaded full with stolen goods and I'm helping ingelo, Mario with it at his request. I know I am in trouble, I wasn't born yesterday. You have got us."

No, it isn't that all you see. If it had been something that you could feel committed them to an irrevocable future talk one might feel one way and I think that we can also visualize the situation in which a man can be

said to think about what he said in the few moments in between and said to himself, "I should never have said that, I would have been a lot better off either just making animal sounds or keeping my mouth altogether shut," and having said as much as "I think I'd better try to follow through."

Now, does that make it unfree? I don't it necessarily does, because suppose the first statement had been something self-evidently inculpatory -- I rean not to be explained away.

Then he thinks "I shouldn't have done it." But he also thinks "I have, now how about it?" Puts it up to himself, "Shall I turn back or go ahead.?"

By the time they get back he hands them this. He reads it over and says "Well, I think we'll go ahead. They have got the way-bills, they have got me and they have got my partner. It doesn't really make much difference what we say.

"If they find you with the man's watch in your pocket, what difference does it make what you say?"

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I think that you have to take not only what was said, but the total posture in which the man found himself.

They knew that they hadn't been driving a straight course from Kennedy to any truck-yard, or Freeport area or dock in State Island.

And they knew that the men they were talking to knew it. One or both knew what was in the back, and the other must have seen in a flash when they realized they were being followed what was in the back.

"There isn't any way out except to try to off-load it on the other fellow," and each did, and if they are going to do it they ought to get to work on it early, so they sign the waiver and get to work on it early.

MR. WASHOR: Well, there are certain flaws that I pick in the Court's --

THE COURT: Oh, sure --

MR. WASHOR: -- reasoning.

THE COURT: -- because we're trying to figure out what other people were thinking, which I'm afraid is what you have to do in this

MR. WASHOR: I mean individually, individually "Oh, we have got a rough morning coming up,," or "I do, he does or both of us do, not a single word need to be said, just keep quiet and see what it's all about."

And of course after being questioned, making the statement--

THE COURT: No, I'm afraid they knew.

Guilty or innocent I'm afraid they knew that

something was wrong.

MR. WASHOR: Sure.

why I was so interested in finding out from Mr. Levin-Epstein what precisely the FBI man knew that made them so confident that this was a truck full of stolen goods, because it could have been a routine shipment, and it could have been just one or two men relieving other men, and then finding "Oh, boy, that's why we were sked to relieve them, because somebody had tipped them that the jig was up, and they knew they were in trouble for having loaded

this stuff and they let us get out on the highway and take the rap for them."

You see, it could be played fifty ways to Christmas, depending on what the facts are.

But it isn't until you get the detailed statements that you begin to get, within them, indices that well -- indices of a some-what different situation.

That's why I said it's two-edged.

They are not pure exculpation. Far from it.

MR. WASHOR: Your Honor, what would your ruling be as to the first statements on the street, would that be a straight --

THE COURT: Out. Except under U.S. against Harris.

MR. WASHOR: Well, Harris --

THE COURT: Just to the man testifying.

MR. WASHOR: That about Bruton, does the Court recognize a Bruton problem? When I say do you recognize I mean --

THE COURT: No. I say I think there is one and I'm waiting with devouring interest to find out whether we're going to have two

trials or one.

MR. LEVIN-EPSTEIN: Do you wish to hear from me at this time, your Honor?

The Government would not move to sever because the Government feels that although there is a Bruton-type situation here, potentially, the Bruton-type situation has been neutralized by the very nature of the statements.

As of course, we argued before, under the STanbridge case, and during the short recess I found --

THE COURT: Have you got the Stanbridge there?

MR. LEVIN-EPSTEIN: I have, your Honor, a very, very marked-up copy of Stanbridge.

THE COURT: No, is it this term of Court?

MR. LEVIN-EPSTEIN: Decided April 1975.

MR. WASHOR: Last year.

THE COURT: That's the September term of

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MR. LEVIN-EPSTEIN: September '74.



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MR. WASHOR: That's what I mean when I say the interlocking, that's what Stanbridge stands for. There has to be an interlocking, there has to be the type of situation where it would make almost very little, if no difference whatsoever, if either one of the defendants acknowledge the statement of the other.

Because that prevents the Bruton problem.

THE COURT: I grasp the question com-

MR. WASHOR: And we can't have any acknowledge here, we have got the buttresting of the statements. For what purpose were the statements made.

THE COURT: I mean I grasp your argument.

MR. WASHOR: Okay. Whether you accept it or not is another story. If you grasp it I will stop.

MR. SCHACHER: Same argument, your Honor. The same situation here.

THE COURT: Well, tentatively I conclude that we have a serious Bruton problem here, but

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I think naturally the Government prevails on this point.

Now, I don't say it's easy, I think it is a very, very close one.

MR. WASHOR: I must give you a -- I'm sorry, I should aid the Court.

my lunch hour by reading STanbridge and Ortiz
to see if I see anything in them that would
push me the other way or if we can find anything
else.

MR. WASHOR: Your Hon I must be candid with the Court as a member still in good standing, I hope, of this Bar.

I have indicated we have had difficulty in reaching a final conclusion as to the method of proferring a defense, if any at all.

We have discussed this, Mr. Schacher and myself, of course with -- not the legal concepts, but the factual -- with the consent of the defendants.

For your edification, for the edification of the Government, if it would be of any value to this Court in reserving decision or rendering a decision on the Bruton issue,
we have calculated possibly putting one of the
defendants on the stand and not the other.

I can't even tell you which one yet.

Not because I don't want to reveal fact, I'm

not playing games.

THE COURT: No, you mean --

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MR. WASHOR: You see the problem that we have.

THE COURT: You shouldn't get it on the record in a way that makes you feel committed in any way to take a course on this issue.

MR. WASHOR: No, you see, the problem is,
Judge, I honestly, having a defendant with me
prior record, with an excellent background,
with documents and records that can establish
what time he got there and not one scintilla
of proof from any witness—Government witness
today, or testimeny to demonstrate that he had
any knowledge whatsoever of what occurred prior
to him getting to Pan Am at that hour, could
proffer testimony—

THE COURT: As you properly pointed out his biggest worry is the talk about posses-

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sion of recently stolen goods, shared posses\_

MR. WASHOR: His biggest problem is the co-defendant's statement, and if the co-defendant, for reasons best known to Mr. Schacher, his decision, does not testify, and the co-defendant's statement goes into evidence and the Government is permitted -- once it's in, of course, they will be permitted -- to argue that these rams' statements butting each other are false, exculpatory statements, we don't get a chance to cross-examine the co-defendant.

THE COURT: See, the difficulty with that is that I assume that we'll have more evidence along the line we had this morning, that anyone that was familiar with the Pan Am operation --

MR. LEVIN-EPSTEIN: I'm sorry, your Honor.

THE COURT: That anyone familiar with the Pan' Am operation would know this was an irregular movement of goods.

MR. WASHOR: Your Honor, don't be too sure that will come in that way.

THE COURT: Well, we'll see. We'll see.

"Olds, plus a demonstration that the excurpa-

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AFTERNOON SESSION (2:05 o'clock)

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THE COURT: I can't make anybody happy this week.

I read the Ortiz and Stanbridge cases and they don't help me much, really. They do gladden my heart because at least they got beyond that stumbling block in the Supreme Court which used the issue immeasurably, and refused to decide it, so that not at least in his Circuit the interlee' ng confession concept is part of the law of the land, and not something that's swept under the rug.

argument that Mr. Washor last made because of its told-fold impolication, that if one of the men felt clear enough about his situation so that he was prepared to take the stand and testify, he would be defenseless against this accusation and might have the greatest difficulty in explaining it away if he could at all, and there would be something in the jury's mind not explained by the circumstance that his fellow defendant did not testify, and thus to that extent seemed to impeach his own charge.

I think that just as - she ild also



add, by the way, that I think Bruton was wrong and Delopolo right and that it would have helped the Supreme Court a great deal if they had dealt with jurors and knew as much as the average judge learns about how far ahead, as the lawyers in the courtroom, the jury always is.

They have twelve heads and they use them. When they are told to read something against Smith and not against Jones, they do it.

I do not believe in this business that only graduates of expensive law schools and high priced lawyers and judges can follow instructions to a jury.

I think that the sensible people on the jury and even half educated people on the jury quite grasp the score and have no difficulty with Delia Paoli-type instructions so I'm totally unsympathetic with Bruton's law of the land, and I think that if you want to use these confessions, on which I would not set very high value, I would have to grant a motion to sever and hope the two trials would not be twice as long as the one,

the picture, Judge.

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but only one and a half times as long.

MR. LEVIN-EPSTEIN: Your HOnor, I would renew at this time, an argument which I made initially in response to all of this business about Bruton, I think that it's not timely made.

on that I'm a little reluctant to rule on that is that we're dealing with business lawyers, we're crowding things along and I happen to know Mr. Washor was in one long trial a good deal of time between the filing of this indictment and its being brought to trial.

MR. LEVIN-EPSTEIN: The Government doesn't attack or -- beg your pardon?

THE COURT: I mean if you believe in

Bruton at all or if you accept it, it's a very

material question that's closely, in the

Supreme Court's view of it, very closely connected

with basic rights and due process, however

phrased, and for that reason what whenever it's

raised I think it has to be attended to.

Now, the other alterantive that I did

permitted to utilize it in appropriate and proper circumstances and make a decision tactical, legal, whatever, to offer in its case in chief on direct --

THE COURT: I think there is both a practical and quite another answer to that.

See, in Stanbridge and Ortiz if either defendant took the stand he was pretty thoroughly hanged by his own statement.

It was manifestly and totally inculpating, and the addition of inculpation that would flow from his co-defendant's quite agreeing in his confession that the testifying defendant was as guilty as sin was nil.

Now, what we visualized here was that at least one of these defendants may well be sufficiently free to testify in the sense of being free of complicating circumstances like a criminal record, that if he took the witness stand at all it would be to sponsor in totality his own alleged inculpatory statement and make it his evidence.

MR. LEVIN-EPSTEIN: Except that we're not -- I'm sorry.

THE COURT: Not anything that he would run away from.

In other words, he would be taking
the witness stand to prove the verity of his
own statements at the vehicle and in the FBI,
and indeed be insisting that "I have said this
from the very start when he asked me right at
the gate of the vehicle," what are you doing,
"I told him what I was doing."

MR. LEVIN-EPSTEIN: That's correct.

I'm sorry, your Honor.

THE COURT: And then he has to face his co-defendant's accusatory statement that he was the principal in the crime.

MR. LEVIN-EPSTEIN: Except that that's not the situation with which we're faced here, your Honor, for in fact, what we're faced with -- I think it's become very clear during the suppression hearing -- is not an inculpatory statement.

In other words, hypothetically in the description and hypothetically that your Honor uses, if Mr. Gerbasio elected to take the witness stand he is not placing himself in the

position of memorilization and inculpatory statement, just the contrary.

THE COURT: That's right. Yes, that is just the point.

MR. LEVIN-EPEPEIN: This is an exculpatory statement.

THE COURT: That's right.

MR. LEVIN-EPSTEIN: And the point is he's not going to be faced with Mr. Delucia's statement saying Mr. Gerbasio did it.

THE COURT: Yes, he is, because -
MR. LEVIN-EPSTEIN: He's merely going
to be faced --

THE COURT: -- if Mr. Delucia is in the case. --

MR. LEVIN-EPSTEIN: Yes.

THE COURT: -- then before the Government has rested, both of these statements will have been offered.

MR. LEVIN-EPSTEIN: That's right.

THE COURT: And will be in the record, so that when either defendant seeks to take the viness stand he is hampered in his adoption this own pre-trial statement by the

accusation of his non-testifying co-defendant, who in spite of what the other defendant say in accordance with his pre-trial statement, is accused as being the principal in the offense by his non-testifying co-defendant, who was there at the time and place and knows all about it.

MR. LEVIN-EPSTEIN: It's recognized that there is a potential problem with that. However, it's not necessary, it's respectfully submitted, your Honor, to resort to the most drastic solution of a severance in order to obviate that danger.

THE COURT: That's what I expected before, that we could go that far and see what happened.

MR. LEVIN-EPSTEIN: Perhaps we could do it differently, in accommodating the Court's suggest with another contingincy plan or a number of different contingincies which I think will satisfy the Court as to the fairness of the proceeding.

First of all, the Court -- as the Court has suggested -- 1 didn't mention this to

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\*r. Pattison in the office, but he'll hear

1t now -- and again correct me if I'm wrong,

- that we continue with the trial and to see
as the case develops what happens.

For all we know at this point neither defendant may take the stand or both defendants may take the stand. As counsel has indicated many times, that decision is still incheate.

In other words, they haven't made a decision whether or not to put in any kind of defense yet. And I believe I'm stating that correctly as to Mr. Washor and Mr. Schacher.

(Continued on the next page.)

MR. WASHOR: Well, in answer just to that aspect, on that train of thought, the Government is aware, or at least the Court should be aware -- we have certain conditions for the defense.

MR. LEVIN-EPSTEIN: Well, --

MR. WASHOR: So that we're not being unrealistic, let's not be unrealistic.

MR. LEVIN-EPSTEIN: But my point, your Honor, and I think Mr. Washor recognizes, when I saw a defense, I don't mean other witnesses, I'm talking about the defendants.

MR. WASHOR: I'm not talking about witnesses as character witnesses. I'm talking about witnesses.

MR. LEVIN-EPSTEIN: Even substantive witnesses, it makes no difference.

MR. WASHOR: That go to the verity of what statement was made by Gerbasio. He said that he arrived at eight o'clock at seven-fifteen in the morning. We're going to prove that.

In addition to which he said that he had a meeting that he had to go to at about

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And now you now have the problem with a man with no criminal record as to whether he's going to testify or not. I'm candid with the Court. I'm not going to mislead anyone under any circumstances, and unequivocally tell your Honor that it is my 100% intention to put Mr. Gerbasio on the stand.

MR. LEVIN-EPSTEIN: Which is exactly what I said.

MR. WASHOR: But the point, the point is can I raise the question later? Am I going to be put in a compromising position saying that maybe I normally would not have put Gerbasio on, but if I do put him on the judge will give me a severance?

You see, that's foolishness.

MR. LEVIN-EPSTEIN: Let me complete my remarks, Mr. Washor, I think that maybe you will see that there are other alternatives.

Your Honor, my point was I think made by Mr. Washor just now that the decision yet to be made whether or not to put the defendants point of the Government trying the case in reverse, as it were because it won't be able to make a decision as to the statements until after the defense rests, but there is an alternative which as I said before, I suggest is less drastic than a severance, and, of course, the majority of the case law, the great volume of case law mitigated against severance where at all possible.

THE COURT: Militates.

MR. LEVIN-EPSTEIN: I beg your pardon, militates.

Initially, your Honor, in the ordinary rules of evidence and cross-examination of a witness, I submit that any cross-examination which would be made of a witness on the stand about the statement of someone else to justify or explain or characterize another person's statement might well be considered to be improper cross-examination.

In other words, if I as an interrogating attorney have a witness on cross-examination were to say "Now, Mr. Witness, isn't it a fact that --"

that the possibility exists that Mr. Washor would not sit sanguinely by and listen to the cross-examination of his client on somebody else's statement and that the --

THE COURT: No, but you see, it's already in the record.

MR. WASHOR: It's in there.

MR. LEVIN-EPSTEIN: Excuse me.

MR. PATTISON: With that, with a proper charge I would assume.

MR. SCHACHER: No.

THE COURT: What -- with a Delapolo charge it's no good.

MR. LEVIN-EPSTEIN: Mr. Schacher, please, you will have an opportunity to speak.

THE COURT: It would be in under the Delapolo charge, which the Supreme Court has said so no good.

MR. LEVIN-EPSTEIN: Except there have been recent decisions of this Circuit, your Honor, which say that in certain circumstances where the Bruton problem has arisen an appropriate curative charge is sufficient to absolve and obviate the Bruton difficulty and I can

cite those cases to the Courts.

THE COURT: I don't have them in mind certainly.

MR. LEVIN-EPSTEIN: Well, I can provide them for the Court.

MR. PATTISON: Your Honor, possibly what I'm about to say may be based on a faulty factual premise, not having been here, but I believe that the only point that I would like to make is that if the Court finds that the two men's statements do in fact interlock, the Court has not made that finding.

THE COURT: No, because you see, what unfortunately in Stanbridge of Ortiz both they seem to have been talking about confessions that interlocked in the sense that either defendant could have signed either one and the differences between them would have been immaterial.

Now, these are quite different, because each one is profoundly exculpatory at the expense of his co-defendant.

MR. LEVIN-EPSTEIN: "mp! ied.

THE COURT: Yes.

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MR. WASHOR: Well, your Honor, might not it be --

THE COURT: And the Government would be offering them as the equivalents of flight by words plus an accusation --

MR. WASHOR: No, no --

THE COURT: -- of the other, felt as 4 co-actor.

MR. LEVIN-EPSTEIN: No, only as a Salse exculpatory statement.

THE COURT: What?

MR. WASHOR: Possibly might not we believe it?

THE COURT: No, see, we have--

MR. WASHOR: Eliminate --

THE COURT: That does not differentiate between the exculpatory statement.

MR. WASHOR: And the inculpatory.

THE COURT: Used as a false exculpatory statement and the inculpatory statement.

MR. WASHOR: Yes, I understand.

THE COURT: The Government is interested in these statements only for their inculpatory effect by using their exculpatory

words, plus a demonstration that the exculpatory words are mendacious.

MR. WASHOR: Your Honor --

THE COURT: So that really they are used as confessions and false accusations.

MR. WASHOR: Well, not as a crossaccusation, your Honor, if we could be allowed to take out from evidence that portion of what each man says concerning the others role.

THE COURT: You mean to redact?

MR. WASHOR: Yes, in other words, have them go in basically saying defendant number one "I don't know anything about this."

THE COURT: Do you think they can be redacted?

MR. LEVIN-EPSTEIN: I'm just looking at them.

MR. WASHOR: Number two says "I don't know anything about this."

Do you know what is interesting about that suggestion, that you're assuming,

Mr. Pattison, that Mr. Gerbasio's statement is in fact false and wouldn't it be unfair to impose upon the Court redaction of a statement that could well be 100% true?

MR. LEVIN-EPSTEIN: You can stipulate that it not be redacted then.

MR. WASHOR: Well, no, the point is --

THE COURT: He won't.

MR. WASHOR: I don't think he has any right, your Honor, concerning that issue.

THE COURT: You see, he has his Bruton right not to be accused.

MR. PATTISON: Yes, but we take out the portion --

MR. LEVIN-EPSTEIN: The mention of the other person; then there is no accusation.

THE COURT: What Mr. --

MR. PATTISON: You're saying that he will not agree to that.

is that I dare you to use the whole of my man's statement against him because if he's free to act and you offer the whole of it in, then I will put him on the witness saturd and he'll prove every word of it is true.

MR. PATTISON: Okay, let him, of course.

THE COURT: Then you see, Mr. Schacher says,

MR. SCHACHER: Mr. Schacher comes into

the picture, Judge.

THE COURT: "You have just cut me to the quick."

MR. PATTISON : More than that.

MR. WASHOR: No, because Mr. Schacher can then cross-examine.

MR. SCHACHER: Are you telling me what I have to do, Mr. Pattison?

MR. TATTISON: So therefore there isn't any problem.

MR. LEVIN-EPSTEIN: Mr. Schacher, please.

THE COURT: 'But he's right. As long as he tells you what you can do and is right about it, that's all right.

MR. PATTISON: I'm not so sure, Judge.

MR. WASHOR: So there isn't any Bruton problem then.

THE COURT: You can cross-examine your co-defendant to the verity of this accusatory statement.

MR. LEVIN-EPSTEIN: That's exactly right.

MR. WASHOR: Now, the problem that raises its head in anticipation, assuming the Court would accept this lesser means of --

THE COURT: Well, redaction is a familiar

one.

solution.

MR. WASHOR: Now, the only problem we have is this:

Is there going to be redaction of both statements.

THE COURT: Of both statements, yes, sure.

MR. WASHOR: Wouldn't that be -MR. LEVIN-EPSTEIN: That's the typical

MR. WASHOR: Would that not be unfair to the defendant Gerbasio to have his accusations of the co-defendant directly or by innuendo --

THE COURT: No, because he has no right to take the witness stand without taking the witness stand for a self-interested purpose.

He has no right to have his exculpatory hearsay shown for the purpose of acquitting him.

MR. WASHOR: Right.

THE COURT: If he wants to have his statement made to gain his acquital he must testify.

MR. WASHOR: In other words alibi cannot

be offered through hearsay.

THE COURT: To go back to the first cbjection you think of, you know, it's self-serving.

MR. WASHOR: Well, the point is -your Honor, the point is that at the time that
Gerbasio makes the statement as at the suggestion of the prosecution and would the Court
acquiesce in the fact that they would eliminate
those portions which say that "I was just helping
Mario?"

MR. LEVIN-EPSTEIN: Yes.

MR. PATTISON:: Sure, sure.

And now you give a statement -- one second, let's analyze it if we can, to this jury on the direct case where when questioned the defendant says "I know nothing about this."

THE COURT: That's right.

MR. WASHOR: That's in essence what we're talking about.

THE COURT: That's right.

And I have always thought that about half thejury buys it.

MR. WASHOR: I will accept that redaction

213 MR. LEVIN-EPSTEIN: I hand up to the Court photostatic copies in their redacted or proposed redacted form of statements made to the FBI on October 23rd, of both Mr. Gerbasio and Mr. Delucia, for the Court's review, of course. THE COURT: I take it on the Delucia one --MR. LEVIN-EPSTEIN: I have made a mistaken and I crossed out that line, then wrote back in again. THE COURT: The redaction would be simply that -- of the word "Told Angelo." MR. LEVIN-EPSTEIN: The words "to help Angelo. " THE COURT: All right. MR. WASHOR: Yes. MR. SCHACHER: May I see that, your Honor? THE COURT: Well, since you're a party to the case you and Mr. Delucia can see. MR. LEVIN-EPSTEIN: I want that in the record. That's a first. MR. PATTISON: Yes, --MR. WASHOR: You can put words in that aren't in here. MR. PATTISON: Yes, you have to -- you 164

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change the sense of those words. Each of those words is in there.

MR. WASHOR: Your HOnor, they seem to be substituting their word to make sense out of it.

MR. LEVIN-EPSTEIN: In fact, the words are substituted to make sense and also to prevent prejudice.

MR. WASHOR: You can't substitute your own word for the state of mind of a statement that was made.

MR. PATTISON: It's done all the time.

THE COURT: Suppose I mark this up again.

MR. LEVIN-EPSTEIN: Of course, your Honor.

THE COURT: You see, this is all that has really be done there if you look at it.

THE COURT: You just have to add "And".

MR. WASHOR: In other words, leaving out "Mario Delucia."

MR. LEVIN-EPSTEIN: Of course.

THE COURT: Oh; yes.

MR. WASHOR: Leaving out "Mario. Delucia."

MR. LEVIN-EPSTEIN: Just the way the Court has done it here.

We'll make a clean copy of his of course.

THE COURT: Yes, we need a clear copy.

MR. PATTISON: "On a truck."

THE COURT: I think -- I thought of sticking inthe word "out."

MR. LEVIN-EPSTEIN: I don't think that it's necessary for us to correct grammar as well.

MR. PATTISON: We will leave it out.

Leave out the word out.

MR. LEVIN-EPSTEIN: Don't be reluctant.

MR. WASHOR: In other words, -- excuse me, in other words, your Honor is going to redact the statement of Angelo Gerbasio to the extent that where Gerbasio said that "Mario asked him why he wanted help and Mario stated that he had a heavy load," that's going to be omitted?

MR. PATTISON: Yes.

MR. LEVIN-EPSTEIN: Right. Also this reference where Mario also told Angelo that he should not say anything to anybody just come with him.

MR. WASHOR: I would ask the portion of the statement where it reads in paragraph two --

MR. LEVIN-EPSTEIN: Which statement is that, mike?

MR. WASHOR: This is Gerba io's statement.

216 Where it reads in paragraph two, the second sentence in paragraph two "Angelo asked Mario why he wanted help and Mario stated that he had a heavy load." I would ask that they be contained in the statement. MR. PATTISON: Hearsay. Your HOnor, that's a self-serving --THE COURT: What do you say, Mr. Schacher, no? MR. SCHACHER: I want that redacted, your Honor. THE COURT: Seems to me in fairness to Angelo, if I may call him that, to Mario you have to leave that out. MR. SCHACHER: Of course. MR. WASHOR: You see, what we're confronted -- now I appreciate the problem over here and -come on now. THE COURT: Here it looks as though management asked him to do it. MR. WASHOR: Yousee, Judge, that's the point. The management and it was Mario that asked him and he was a friend of his, and he's going to 167

testify he knows the man for years and years.

MR. PATTISON: Let him testit to it. Fine.

THE COURT: Wait till he testifies. If he testifies to that effect see, then Angelo can cross-examine him -- I mean Mario.

MR. PATTISON: Mario can cross-examine him, and everything comes in.

THE COURT: You see, then it's all right.

And at that point this becomes prior --a prior consistent statement and the reduction has
to be undressed.

MR. WASHOR: That's what I'm concerned with.

In other words, I don't want the Jury to
hear on the Government's case this much of a
statement by Gerbasio and when he should testify
they get the impression that he's embellishing here
at the trial.

THE COURT: No, I think at that point -you would be entitled to --

MR. LEVIN-EPSTEIN: Bring out whatever you want.

THE COURT: Show the prior consistent state-

MR. PATTISON: Definitely.

THE COURT: IN view of the fact that the redacted statement would already be before the jury and would not have that in it.

MR. LEVIN-EPSTEIN: If you want to.

THE COURT: If you wish.

MR. PATTISON: He may then affirm all of the false statement as it was made then, if he sees fit.

THE COURT: As he spoke in the presence of the jury and of his co-defendant of this things, so then he's fully examinable about them, and this becomes simply a prior consistent statement.

MR. LEVIN-EPSTEIN: Then, of course, it's recognized that the whole statement comes in.

MR. PATTISON: Sure.

MR. LEVIN-EPSTEIN: Because he's undressed it.

THE COURT: Oh, yes.

MR. LEVIN-EPSTEIN: Of course. You can't have your cake and eat it.

MR. WASHOR: I guess I can't do what the Government does.

MR. PATTISON: Wat?

MR. SCHACHER: Have your ice cream.

MR. WASHOR: Have your cake and eat it, redact a statement so that the Jury gets an impression.

MR. PATTISON: Not prejudicial, of course.

MR. WASHOR: Not prejudicial to Gerbasio,
not prejudicial to GErbasio, because you see, we
have -- what you're not familiar with, Mr. Pattision,
is the following facts:

The Government continues to allege here prior to trial that they are going to prove a statement of Gerbasio to be false.

THE COURT: That's right.

MR. SCHACHER: By indirection.

MR. PATTISON: Yes.

MR. WASHOR: No, I didn't say by indirection.
They are going to prove it.

THE COURT: As part of Mr. --

MR. WASHOR: As part of their case.

Now, you're offering a statement in evidence, the statethe statement that offered in evidence, the statement that you offered in evidence in a redacted
form is that he arrived at 7:15, at about eight
o'clock he was asked to help on a truck, the next
thing you know he had no idea where he was going,

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he didn't know the truck contained freight.

MR. LEVIN-EPSTEIN: That's correct, that is absolutely correct.

MR. WASHOR: That's the substance of it.

What's false about those statements?

MR. LEVIN-EPSTEIN: Wait for the trial.

MR. WASHOR: Well, you're not going to go through an entire trial and then find out that by innuendo and because he was present in a truck and a legal inference of possession of recently stolen goods, proves this statement to be false.

MR. LEVIN-EPSTEIN: That's right.

MR. PATTISON: Why not?

MR. WASHOR: Because that is not proving this statement to be false.

MR. PATTISON: Yes, it is.

MR. WASHOR: No, it is not.

THE COURT: All right, then --

MR. PATTISON: Even under the state of fact you allege I think can come in.

THE COURT: Look, you see, then you're home.

MR. LEVIN-EPSTEIN: Exceptly, if we don't prove it he's acquitted.

THE COURT: Because if that isn't proof then

this becomes evidence which the Government has vouched for. It's not worth a darn to the Government unless they can prove it.

we were talking there I was looking at this,
Mr. Washor.

MR. WASHOR: I'm listening.

THE COURT: We could pluck out the period after the words "to help on a truck" and take from the next lines "that a heavy load."

MR. WASHOR: I don't know how the Government feels about that.

MR. LEVIN-EPSTEIN: What's that, your Honor?

MR. WASHOR: No, I would just as soon leave

it alone.

You see, the reason I say that because -
THE COURT: Just if you wanted an explanation

of why he was --

MR. WASHO:R You see, having a heavy load come that there was a heavy load on the truck or the coming after a heavy load to pick up.

MR. LEVIN-EPSTEIN: Quite frankly, your Honor, I didn't hear what your suggestion was.

THE COURT: See, he was asked to elp on a truck, then drop down to the next line that had

a heavy load."

MR. WASHOR: But that would implicate that it had a heavy load on it.

THE COURT: No, no, look down. Next paragraph, second sentence.

MR. WASHOR: "He was going to pick up a load at some pier in Staten Island."

THE COURT: A heavy load.

MR. WASHOR: As long as there is no dispute with the Government that that's the intendment of the statement, so I would ask that we incorporate in "that had a heavy load."

MR. SCHACHER: I would like to have that out, your Honor.

THE COURT: WHY?

MR. SCHACHER: Well, there is an inference that Mr. Delucia --

MR PATTISON: Told him that,

MR. SCHACHER: What's that?

MR. PATTISON: Told him that.

MR. SCHACHER: That's correct.

THE COURT: No, because it's management at this point, for all anybody knows.

MR. SCHACHER: I can't see that at all,

supposed to go off to attend the union meeting with the union contract.

MR. WASHOR: Judge, left --

THE COURT: Now, if he wants to still argue,
"But I was asked" then I think he has to explain
it and he can't ask to have it explained by having
his accusatory statement of somebody else offered
in evidence where it would blast somebody else.

MR. WASHOR: Well, don't we have a right to offer a statement in its entirety when a portion is being offered.

THE COURT: No, that's the point of redaction. Not where it is accusatory here as to a co-defendant. If you want to accuse a co-defendant you must do it from the stand.

MR. PATTISON: It is here otherwise.

(Continued on the next page.)

the necessary papers to make a pick-up from a pier at Staten Island.

MR. LEVIN-EPSTEIN: Right.

MR. WASHOR: Well, it's Angelo who had the keys, Angelo was supposed to do this, Angelo was supposed to do that.

The point of the redaction is to prevent Delucia's statement from in any manner of form prejudicing Gerbasio.

MR. LEVIN-EPSTEIN: Suppose, -- oh, I beg your pardon, go ahead.

Are you finished?

MR. WASHOR: That portion I am.

MR. LEVIN-EPSTEIN: Suppose Mr. Delucia had said -- had not said that Whalen told him to help Angelo, your Honor, but suppose he said that Whalen told him to help John Wayne.

MR. WASHOR: Well, then I would have no objection, just get Gerbasio out.

MR. LEVIN-EPSTEIN: All right, then we'll just remove the name Angele Gerbasio.

MR. WASHOR: It's not a question of removing the name, it's the import.

See, the Government is tryin to : directly

236 for a severance on all the grounds heretofore urged. THE COURT: Yes, I think it must be agreed that you gentlemen both have exceptions to the way I proceed .--MR. LEVIN-EPSTEIN: Your Honor, -- yes, I'm sorry. THE COURT: -- in treating these as receivable in evidence and as treating them as taken free of any Bruton objection when so redacted. MR. WASHOR: Correct. THE COURT: Those two rulings you except to? MR. SCHACHER: Your Honor -- that you, your Honor. MR. LEVIN-EPSTEIN: Your Honor, I would like -- I know we're running late, but I will be honest with the Court. My head is swimming with all of the offers and counter-offers, problems and counter-problems, in order that I don't make a mistake, --MR. SCHACHER: Your Honor, I can't believe --176

do what they can't do directly by law.

THE COURT: All right, I guess we'd better

MR. LEVIN-EPSTEIN: That sentence.

THE COURT : Sentences two, three and four in paragraph three.

MR. LEVIN-EPSTEIN: From the word "According" to the end of the paragraph.

THE COURT: Yes.

MR. LEVIN-EPSTEIN: Yes, all right.

MR. WASHOR: Then in paragraph six --

THE COURT: Yes, Mario says all he can say was that he was told to make the pick-up from a pier in Staten Island and could not furnish any further information.

MR. WASHOR: As long as Gerbasio is left out of that .

MR. LEVIN-FPSTEIN: And the words "Help Angelo to" will be deleted.

THE COUNT: Yes.

MR. SCHACHER: In the sixth paragraph of the Delucia statement.

MR. WASHOR: By the way, your Honor, might the record indicate that by the participation in the redaction issue we do not valve the motion

(The following was held outside the presence of the jury.)

MR. LEVIN-EPSTEIN: I ask for this brief delay in calling the jury out to advise the Court that I have served upon both Mr. Schacher on behalf of Mr. Delucia and Mr. Delucia, the photostatic copies of the approved redacted version of both statements as we discussed them in yesterday's proceeding. For purposes of clarity in the record and convenience for fort, I have taken the liberty of pre-marking the 3500-4 and the Gerbasio Statement and 3500-10, 3500 is - redacted version of FBI report of investigation summarizing oral statements of Mario J. Delucia, dated 10/23/75 and 3500-10 is described as follows.

Redacted voice summarizing oral statements Angelo Gerbasio, dated 10/23/75.

THE COURT: I take it that is the date of the dictation?

MR. LEVIN-EPSTEIN: that is the date of the actual statements, that is the cate of the interview.

For the record, as long as the Court has made the inquiry. Every time i mention a date i respect to the date of the 3500 material, that it is event actually occurred, there has been some confus on of what dictation

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date is, or for your own consideration and there will be no question later on. I hand up to the Court the official version of 3500-9 and -10 for your review.

THE COURT: Very well.

MR. LEVIN-EPSTEIN: Do they meet with the Court's approval, Your Honor?

THE COURT: Yes.

MR. LEVIN-EPSTEIN: Very well, the govern-

THE COURT: Bring in the jury.

(Whereupon the jury took their respective seats in the jury box and the trial continued in open court.)

MR. LEVIN-EPSTEIN: The government calls its first witness in this case, Joseph Simon.

(Whereupon the witness was swern and took the stand.)

THE CLERK: Would you state your name for the record please.

THE WITNESS: Joseph G. Simon.

MR. LEVIN-EPSTEIN: Your Honor is it the Court's preference that I use the microphone, I think I can keep my voice up enough.

THE COURT: Until he jury signals that they can't hear you or the wirness.

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A No. It was an office.

Q I see. And this is where your normal practic

Would it be fair to say this might be less form-

A Yes.

was to have your coffee break?

Q Directing your attention to approximately October the 17th of 1975.

Did there come a time during the early morning hours of that shift when you went to have your regular coffee break?

A Yes.

Q Did there come a time during that coffee break that you met with one Mario DeLucia?

A Yes.

Q Did you know him by that name?

A No.

Q

What name?

A Mario.

Q Look around this courtroom and tell us if you see Mario?

A Yes. I do.

Q Point him out clease?

A Second man on the right we rin the glasses

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sir?

MR. LEVIN-EPSTEIN: Indicating the defendant,

Your Honor.

Q On that day did you have a conversation with Mr. DeLucia in the ground transportation area?

A Yes. I did.

Q Did he initiate the conversation, or did you,

A He did.

Q Will you tell us, this jury please to the best of your recollection as you sit here today what did he say to you, or you to him in response?

A He asked if he could talk to me in private.

Q What did you say?

A Yes.

Q What did he say?

A Come outside with me.

Q Where did you go?

A The ground transportation manager's office.

Q Where was that, sir in respect to where he first approached you?

A Approximately 15 feet from where he first approached me.

Q Could you describe that facilaty with any part-

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icularity to the best of your recollection?

A There's two sommeted offices and three desks

Q Did you arrive ultimately in that office with Mr. DeLucia?

A Yes. I did.

Q Was there anybody else present

A No.

Q The two of you were alone?

A Yes.

Q Did you have a conversation with him in this second office?

A Yes.

Q Tell the jury and the Court at that time what did he say and what if anything you said in response?

A He asked me if I would be intersted in making a few extra dollars in the sum of \$200 to \$250. He went on further to explain it would be to help him steal from the company.

Q What company was he speaking of?

A Pan-American.

Q The company for which you both orked?

A Yes.

Q Did you know what assig me t M . Del cia had at

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that time?

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Yes.

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Q Tell the jury please to your knowledge what assignment he had?

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A He was supervisor in charge of drivers in ground transportation.

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Q Was he a member of the Teamsters Cargo Handle 3?

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No, he was not.

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Q What else did Mr. DeLucia say to you if anything,

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sir?

A

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A He told me he would be in contact with me on the following Wednesday.

Q What truck as he talking about. Did he explain

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That would have been October 23?

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A That is correct. And he would point out the

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freight that he wanted to be helped put on the truck.

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that to you?

the truck.

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A No.

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Q Did he explain to you what he meant by point out the cargo?

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A Yes. He meant that somehow he would show me
the cargo he wanted and he would go and get the truck and
some other time during the evening I would he p his put it on

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would be loaded?

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A He said approximately bay doors number 7 and 8.

Did he tell you where the truck would be when it

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Q Could you describe for the jury what doors 7 and

8, or doors that he described are; are they numbered?

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Yes, they are.

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Where are these numbered doors located within

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the facility?

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A They are on the - I believe the nor h side of the building they're used for loading of trucks, the picking up cargo for different companies.

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Are these doors sometimes called bays? Q

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Yes. They are. A

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B-A-Y-S? Q

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Yes. They are.

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Sometimes called loading bays?

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Yes.

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What did Mr. DeLucia tell you if anything about the truck in the loading bay?

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That he would put the truck there.

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Q Did you discuss - withdrawn.

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You said that Mr. DeLucia offered you between \$200 and \$500 for this work?

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A Yes.

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Q Describe that to the jury and Court what your role in this theft would be according to him?

A I was to bring the freight to the door as best

I could and he would load it on the truck from there.

Q Did he tell you if anybody else would be with him?

MR. WASHOR: Objection, he is leading the witness now.

MR. LEVIN-EPSTEIN: The question was would he tell you if anybody else would be with him when loading the truck?

THE COURT: Overruled.

THE WITNESS: He mentioned there would be somebody else.

Q Did he tell you the name of the other person?

A No.

Q Did you have a discussion about this other per-

A Yes.

Q Would you tell the Court and jury please what if anything Mr. DeLucia told you about this other person and what if anything you said in response?

MR. WASHOR: Eefore the ans er to that question may we have a sidebar.

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THE COURT: Very well.

(Whereupon a sidebar conference was held outside the hearing of the jury.)

MR. WASHOR: Your Honor, in anticipation of the answer relative to the third party I would request that this would be the appropriate time to admonish the jury that they're not to infer in any anner or form whoever the third party is being discussed by this witness. It cannot comply to the accused angelo Gerbasio until and when there is evidence to show that he was actually the party inferred to.

MR. LEVIN-EPSTEIN: I have no objection to that.

THE COURT: I an't think he's going to name him.

MR. LEVIN-EPSTEIN: Of course not.

MR. WASHOR: I presume that he will not be made I think inferences can be drawn by jurors unless the inferences are restricted by the applicable law.

THE COURT: I Think it's a mistake to put his name on at this point, no body knows I think to delay it -

MR. WASHOR: I'm not askir that his name, I want the Court in its own inimitable lay.

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THE COURT: If you want me to say it now, if I say it now it will be pointing right at Mr. Gerbasio whether his name is used at this time or not.

MR. WASHOR: I can reserve my right to ask the Court to make the appropriate admonishment at a future time.

THE COURT: Yes.

MR. LEVIN-EPSTEIN: I don t want the jury to be admonished of something out of context now, or we wait until the jury is instructed.

THE COURT: It's when it's appropriate at this point, I don't think it's appropriate. The name is put on --

MR. LEVIN-EPSTEIN: I'll represent to the Court that I don't anticipate this witness to name Mr. Gerbasio.

THE COURT: That is what I understand at the pre-trial hearing.

I don't think the last answer was complete, I am not sure.

(Whereupon the trial resumed in open court.) THE WITNESS: He told me he was not going to inform me of the other person's mame, nor would be refer my name to the other person so the only person that

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would get in trouble and the only one to who - could be involved would be himself.

- Meaning Mr. DeLucia?
- Yes.
- And of course yourself?
- Yes.

Did you discuss what arrangements if any could be made between yourself and the defendant for the purpose of you being paid for your role in this theft?

I would be paid some time later after it had been disposed of, the cargo.

- Q After Wednesday in other words?
- Yes.
- Physically, could you describe for the jury and for the Court what you physically would have to do in order to follow through with Mr. DeLucia's offer?

MR. WASHOR: Objection Your Honor.

THE COURT: Overruled.

You may answer the question.

I would have to deliver the cargo to him by one of three ways.

Either by using a fork lift.

- I fork lift, a particular type of machinery? ର
- 'es, it is.

187

		4:
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2	A	Went back to my work area.
3	Q	Approximately what time was that?
4	A	A quarter to three.
5	Q	And so when you went back to your work area did
6	you work with	your other colleagues other co-workers?
7	A	Yes. I did.
8	Q	For approximately how long?
9	A	Approximately two to three minutes.
10	Q	What happened then?
11	A	I had to go out to Mr. Godoy's office with some
12	freight and w	hen I went out I made sure nobody saw me and I
13	went to his o	ffice.
14	Q	Did you meet with Mr. Godoy?
15	Α	Yes. I did.
16	Q	Did you have a conversation with Mr. Godoy?
17	A	Yes. I did.
18	Q	Tell us what you said to Mr. Godoy?
19	A	That Mario had approached me to steal from the
20	company and I	wanted him to be notified.
21	Q	Mr. Godoy?
22	A	Yes.
23	Q	Did you tell him about the conversation you just

described with Mario?

A Yes. I did.

		Simon/Direct	3. c.	24
1				
2	Q	How much of the conversation?	•	
3	A	All of it.		
4	Q	As you described here today?		
5	A	Yes.		
6	Q	You told him how Mr. DeLucia	was going	to point
7	out the freig	ht?		
8	A	Yes.		
9	Q	What else did you tell him?		
10	A	On what date this would take	place.	
11	Q	The following Wednesday?		
12	A	That is right.		
13	Q	What else did you tell Mr. Go	doy?	
14	A	I thought he should notify so	meone who	would
15	catch him in	the act.		
16	Q	After you told Mr. Godoy ever	ything tha	t Mr. De-
17	Lucia told yo	u, what did you do that night?		
18	A	Went back to my work area.		
19	Q	Did you finish this shift tha	t night?	
20	Α	Yes.		
21	Q	And went home?		
22	Λ	Yos.		
23	Q	Directing your attention to a	short per	iod later,

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a number of days later did you have occasion to speak to any-

body else about the conversation you hal on that shift with Mr.

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## DeLucia?

- A Yes. I did.
- Q Who did you speak to and when?
  - A Mr. Joe Butta on the following morning.
    - Q That would be on the 21st?
- A Yes.
  - Q During your midnight shift?
- A Yes.
  - Q What time did you tell Mr. Butta alout the conversation?
- A Some time around my lunch hour, around 4 A.M.
- 13 Q What did you tell Mr. Butta?
  - A I told Mr. Butta the same thing that I just said to Mr. Godoy and asked him to check on it because I had not heard anything from Mr. Godoy as to should I go along with it or not.
    - Q And after you told Mr. Butta about this plan of Mr. DeLucia, what happened them?
      - A I went back to my work area.
- 21 Q Did you finish your shift on that day, early
  22 Monday morning?
- 23 A Yes. I did.
- Q Mr. Simon, I'll girect your attention to this time, to the early morning hours of the 23rd, Thursday morn-

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ing, following the shift on Wednesday at about 11:30 P.M. Did you work on that shift?

A Yes. I did.

Q Did there come a time in the early morning hours when you met with and had a conversation with this man Mario DeLucia?

A Yes. I did.

Q Do you recall, and tell the jury and Court approximately when you had that conversation with Mr. DeLucia?

A Shortly after midnight.

Q What did Mr. DeLucia say to you, sir and what did you say to him if anything in response?

A He pointed out the freight to me to be put on the truck.

Q What did he point out to you?

A Three tow carts marked with an nirway bill and cartons of other goods.

What if anything did you do or say?

A I tolu him the best time to do it would be during a coffee break.

Q. First or second coffee break?

A First one.

Q Approximately 2 A.M.?

		Simon/Direct 27
1		4:
2	A	2:30.
3	Q	What if anything did he say to you in response?
4	Λ	He would have the truck near door, either 7 or 8.
5	Q	Did Mr. DeLucia show you shipping papers for
6	these goods?	
7	A	No. He did not.
8	Q	Any bills of lading to his care?
9	A	No.
10	Q	Did you discuss anything like that at all?
11	A	No.
12	Q	Did you discuss anything about the cargo with
13	him at that p	oint at all?
14	A	No.
15	Q	Then you went back to work?
16	A	Yes.
17	Q	Did you have any personal knowledge of what Mr.
18	DeLucia did a	fter you spoke to him?
19	A	I do not.
20	Ó	Do you know where he went of your own personal
21	knowledge?	
22	Α	No. I do not.
23	ę	How long did you work when you went back t work

on that morning?

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- Q What happened at 2:30, sir?
- A TR-5 yelled coffee break, I hung back to make sure there was nobody around then I went and got the freight and pushed it over to the truck where Mario loaded it.
- Q When you pushed this cart over by the bay, do you recall which bay it was that you went to?
  - A Number 8.
- Q When you pushed the tow cart over by bay 8 was there a truck backed up to that bay?
  - A Yes.
  - Q Do you know what kind of truck?
- A It was a Pan-Am truck.
- Q Mr. DeLucia was present?
- A Yes.
- Q Did you see anybody present with Mr. DeLucia?
- A No.
  - Q What happened when you pushed these carts full with the merchandise over to bay 8?
    - A Mario started putting it in the truck.
  - Q What did you do?
    - A I threw the signs off the tow carts and threw them to one side.
      - Q Did you assist Mr. DeLucia in loading the truck?
- A No. I did not.

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Q Most times it's completely filled with cargo, right, sir?

A Yes, sir.

Q Now Mr. Simon, please forgive me, sir. What are your duties again?

A To check in freight when it comes off the aircraft.

Q And also to store the freight?

A Yes, sir.

And what procedure do you do when you check the freight in sir?

A I have to mark the freight with the copy of the airway bill, find out it's destination so I can expedite the freight to its proper destination.

Q In addition to that when the freight comes in by plane?

A Yes, sir.

Q Do you put it in a certain designated spot?

A Yes, sir.

Q Are you the only one that does that?

A No, sir.

Q With reference to the merchandise inviving this particular case, were you the only one that put the merchandise in that building?

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THE COURT: We'll have to have a short break now because we're running out of stenotype paper. Please do not discuss the case with one another or with anyone not on the jury until it is given to you to decide. Please go to the jury room now.

(Whereupon a short recess was had.)

(After a short recess the trial proceeded.)

MR. WAJHOR: Your Honor, no cross examination.

MR. LEVIN-EPSTEIN: I have no questions on redirect, may the witness be excused, no questions.

THE COURT: All right, witness excused.

MR. LEVIN-EPSTEIN: Government calls as its next witness Mr. Fred Godoy. Mr. Godoy would you step forward nlease.

(Whereupon the witness was sworn by the clerk of the court.)

THE CLERK: Please state your full name?

THE WITNESS: Jose F. Godoy. G-O-D-O-Y.

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Would you speak into the microphone so we all can hear you clearly.

Would you state your full name for the jury and for the record?

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- A Jose F. Godoy.
- 3 Q What does the F stand for?
- 4 A Frederick.
- 5 Q Are you employed?
- 6 A Yes. I am.
- 7 Q What is your occupation?
- A I am Pan-American Cargo Manager.
- 9 Q As cargo manager is that the same as a super-

10 | visor?

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- A A little higher.
- Q Would you explain briefly for the jury and for
  the Court what your duties as a cargo manager for Pan-American

14 | are?

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- A I oversee a certain amount of people, midnight

  16 shift, 4 to 1 shift. I have some IBT personnel assigned to me.
- Q What is IBT?
- A International Brotherhood of Teamsters.
- 19 Q Do you belong to the union as well?
- 20 A No, sir.
  - Q Are you considered the ranager?
- 22 A I am.
- 23 Q For how long?
- A 15 years.
- 25 O During the course of these 15 years, now long

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A Yes. He was.

Q Was he working under your supervision?

A Yes. He was.

Q Were you doing a substantially the same duties that you described you have now?

A Yes.

Q Was Mr. Simon to your knowledge?

A Yes.

Q Directing your attention, sir, to October the 17th of 1975 were you working in the early morning hours of October the 17th?

A Yes. I was.

Q Had you in fact begun your shift for that period of time?

A Yes, sir.

Q Let me finish my question. Late the previous night, in other words 11:30 on October the 16th?

A Yes.

You were working through till approximately 8

1 A.M.?

A Yes, sir.

Q Do you know whether or not Mr. Simon was working on that shift?

A He was working, yes.

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Q Did there come a time during the early hours of the 17th that Mr. Simon and you had a conversation?

A Yes, sir.

Q Would you tell the Court and jury please first of all when did this conversation occur to the best of your recollection?

A Approximately around 1:30, 2 o'clock in the morning, around that time.

Q Is there anything specific in that time that helps you remember that time?

A We have a break usually at that time, coffee break.

- Q Did you go to him, or him to you?
- A He came to me.
- Q Where did he come?
- A My office.
- 18 Q Where is that located?
- 19 A In the building, Cargo 67.
- Q Is that a building that is attached to the Pan-

## 21 | American --

- A It's Cargo Building 67 strictly for cargo.
- Q Your office is within Cargo Building 67?
- A On the main floor.
- Q Could you estimate with any specificity approx-

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imately how far from your office Mr. Simon was working on that particular night or shift?

Maybe about 100 feet.

When Mr. Simon came to you did he have a conversation with you?

Yes, sir. He did.

Tell the jury please what Mr. Simon said to you and what if anything you said to him in response?

Mr. Simon approached me and told me one of the motor gool drivers wanted to have some cargo set up to be stolen.

Did he at the time tell you the name of the motor pool driver?

> A Yes.

Q Did he give you a name?

He said Mario.

Q Did he give you a last name?

A No, sir.

What if anything did he tell you?

This incident was supposed to take place on a Wednesday the following week.

That would have been October the 27th -- 23rd?

Yes.

0 Did he tell you anything else about it?

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MR. WASHOR: He's leading the witness.

THE COURT: The witness may answer.

Q Can you reneat that nlease?

(Whereupon the last question was read back by the reporter.)

THE WITNESS: Yes.

Q What did he tell you, sir?

A We are talking, is this on the 17th that we are talking about now?

Q That is correct.

A On the 17th all he approached me on was exactly what that was in the letter you just showed me and that the apparent theft was supposed to be taking place next week on a Wednesday.

Q That would have been October the 27th actually?

A October the 22nd, yes.

Q Was the theft to occur on a particular -- any particular time on that Wednesday?

A At this time we didn't know.

Q Now, after Mr. Simon told you that Mario the motor pool driver had approached him to steal some cargo on the following week did there come a time when this conversation with Mr. Simon ended?

A Yes.

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- Did he leave your presence?
- Yes. He did.
- While he was there did you make any notes or write anything down in Mr. Simon's presence?
  - No. I didn't.
- Did you make any notes or write anything down after Mr. Simon left?
  - No. I didn't.
- What did you do after Mr. Simon left with resnect to this conversation?
- Nothing. It was Saturday morning and I was off the next two days.
- Sunday and Monday? Q
- 15 Sunday, Monday, right.
  - Did you go to work on the following day?
- 17 I was off.
  - Did you go to work on the Monday?

I spoke to Mr. Parrille.

- 19 Yes.
- Directing your attention to Monday October 21,
- 1975 Did there come a time you received a telephone call? 21
- 22 Yes, sir.
- 23 As a result of receiving that telephone call what if anything did you do?

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Yes.

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Q Let me finish my question because the reporter has to get it down and it's difficult when more than one person is talking at the same time.

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You met with Mr. Parrillo Monday?

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Yes.

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Approximately what time?

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10 o'clock in the morning.

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Q Was there anybody else present with you and Mr.

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Parrillo when you met in his office?

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Two FBI officers present.

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Do you know who they were?

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A At this time I didn't, just when I got to the

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office I was introduced to both the agents.

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Q Do you recall their names?

17

Yes.

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Q What were they?

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Frank Jules and Mr. Jack Walsh.

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Do you see either or both of those agents?

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A I see Mr. Jules here.

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MR. LEVIN-EPSTEIN: Indicating the case agent

23

a. Plaintiff's table, Your Honor.

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During this conversation between yourself Mr.

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Jules, the other FBI man and Mr. Parrillo, did you have a, or

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participate in a conversation with these men?

- We had a conversation, yes.
- Please listen to my question so we won't run afoul of the Court's ruling.

As a result of that conversation without giving the Court or jury the contents, as a result of that conversation what if anything did you do?

- I explained to him exactly what Simon told me.
- Who did you say that to?
- Mr. Parrillo, Mr. Jules who was present and Mr. Jack Walsh.
- After you told them what Simon told you did there Q come a time that meeting ended?
  - Yes. There did.
  - After you left that meeting where did you go?
- I went home.
  - Now, sir, directing your attention to the evening hours of October the 22nd late Wednesday night did there come a time that you went to work in the regular course of your duties?
    - Yes, sir. A
    - Cargo Building 67? Q
- 24 Yes, sir.
  - Approximately what time did you get to work late Q

1		***
2	Q	Who did you call to tell them you had come to
3	work, do you	know?
4	A	I believe it was Mr. Jules, Frank Jules.
5	Q	You notified Mr. Jules, or you believe it was
6	Mr. Jules, by	telephone?
7	A	I notified him by phone Mr. Jules or Mr. Walsh.
8	Q	Then you proceeded with your work for the even-
9	ing?	
10	A	Yes, sir.
11	Q	You worked in your office, did you?
12	A	Yes, I did.
13	Q	Directing your attention to approximately 2 A.M.,
14	did anything	occur at that time with respect to the events of
15	the evening 1	ater to transpire?
16	A	Mr. Simon approached me.
17	Q	This is the same Joseph Simon we spoke of before?
18	A	Yes, sir.
19	Q	Where did he approach you; sir?
20	A	My office.
21	Q	Did you have a conversation with Mr. Simon at
22	that time?	
23	A	Yes. I did.
24	Q	This was approximately what time?
25	A	Quarter after two.

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Q What did Mr. Simon say to you; by the way, was anybody else present?

A No, sir.

Q What did Mr. Simon say to you, sir and what did you say to him in response if anything?

A Mr. Simon approached me and said they were planning on taking some cargo that was over by our door 9, tow carts, various cargo on there.

Q When you describe the person that was planning this did he describe him by name?

A Yes.

Q What name did he tell you?

A Mario.

Q Did he give you a last name at that time?

A No, sir he didn't.

Q What else if anything did Mr. Simon tell you?

A Approximately around 2:30 the apparent theft would start to take place.

Q Did there come a time during this meeting with Mr. Simon when you received anything from him?

A Yes.

What did you receive from him?

A Some slips of paper that we normally put on the tow carts with an airway bill on it number of pieces on each

MR. WASHOR: I have one other matter before this is resolved if I may.

MR. SCHACHER: Judge Dooling, my client has no objection to her remaining.

MR. WASHOR: While the missing juror is being located.

Your Honor, we received the grand jury minutes in this matter, I think it was yesterday if I am correct Mr. Levin-Epstein turned it over as part of the 3500 material.

MR. LEVIN-EPSTEIN: Two days ago.

MR. WASHOR: It's short. I read it, I have nondered over it, I even took the most current rules of criminal procedure to check that maybe my book is not up to date there is just no motion in the federal court that relies as to the legal sufficiency of the evidence before a grand jury. However, I think that the rationale is found in the presumption of the validity and legitimacy of such an instrument of an indictment.

THE COURT: Were any exhibits marked before the grand jury?

MR. WASHOR: No.

MR. LEVIN-EPSTEIN: I don't believe so You.

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from the questioning there was a, what is called an FD 302 prepared by the witness. It was marked as Government's Exhibit 3500-1 and had been surplied to counsel. Through oversight that point had slipped counsel's mind and if it had not our eritre confidence that he would have under that the name of DeLucia had been disclosed

Yoos/Direct

MR. LEVIN-EPSTEIN: Thank you, Your Honor I have no questions of this witness on redirect, any further Your Honor. May the witness be excused?

THE COURT: Yes.

to Mr. Westhoff.

MR. LEVIN-EPSTEIN: The government calls Special Agent Walter Yoos.

(Whereupon the witness was sworn by the clerk of the court.)

THE CLERK: Would you state your name, sir?

THE WITNESS: Walter Yoos, Y-O-O-S.

## DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Would you state your full name once again for Q the jury, sir?

> A Walter F. Yoos.

0 You're employed, sir?

Special Agent, Federal Bureau of Investigation

How long have you been employed as a Special Agent for the FBI?

3

25 years. A

5

Are you currently assigned to the resident agency

6

at JFK?

7

A Yes, sir.

8

Q How long have you been assigned there?

9

Approximately 2 years.

10

To October 23, 1975 were you assigned and employed

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by the FBI at JFK Airport that day?

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Yes, sir.

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Were you working on that date?

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Yes, sir.

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Directing your attention to the early morning hours of October 23 last year. Did you have occasion to be involved in a particular operation or assignment on that morn-

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ing?

Yes, sir.

investigation in that building.

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Would bu describe briefly for the jury and for the Court what your assignment was and what your activities were that morning?

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On the early hours of October 23, 1975 we were on a surveillance at Pan-American Cargo area Building 67 on an

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- Q In your office?
- 3 A Yes, sir.
  - Q Did you use the binoculars, both you and agent Haines?
    - A Yes, sir.
  - Q To a period of time after the surveillance commenced, did there come a time you observed any activity with respect to these 2 trucks?
    - A Yes, sir.
    - Q What time?
  - A 2:45 A.M.
  - Q Would you tell the jury and Court what if anything you saw at approximately 2:45 on the morning of October 23, 1975?
  - A At approximately 2:35 A.M. while watching bay 9, there is a space between the cargo nost and the truck itself which gives you vision into the inside of the cargo area.

At that time it was observed Mr. DeLucia moving 2 cargo trucks which carried the cartons, from the area to the truck that was marked in bay 9.

At this time DeLucia took the cartons from these trucks and placed them aboard the truck in bay 9. The Pan-American truck at that time.

Q Let me interrupt you for a moment. Do you see

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that man Mario DeLucia in court here today?

- A I do.
- Q Point him out?
- A. Mario DeLucia.
  - Q The man standing?
- A Yes, sir.

MR. LEVIN-EPSTEIN: Indicating the defendant.

Q After you saw Mr. DeLucia load this truck with the cargo what did you see then?

After he loaded the truck he got into drive the truck and he moved that truck around the cargo building to the south side and parked it in the first lane pointing towards the building, there secured the truck and went back into the building.

- Q Did you see anybody assisting, or with Mr. De-Lucia when he loaded this truck?
  - A No. sir.
- Q Did you see anybody with him when he got into the truck and moved it to the south side of the building?
  - A No. sir.
- Q Had you seen anybody with Mr. DeLucia after he came back to the building?
- 24 A No, sir.
  - Q After Mr. DeLucia marked the car there dil you

maintain surveillance on the truck?

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Yes, sir -- no, sir the truck was parked there for a number of hours.

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Nobody went near it that you saw?

6

Nobody.

7

Did there come a time that you did observe activity with respect to the truck?

9

8

Yes, sir.

10

Approximately what time was that?

11

Approximately 8:05 A.M.

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What did you observe at 8:05 that morning, sir?

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At 8:05 I observed Mario DeLucia and Angelo

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Gerbasio come out of the cargo building on the south side and

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enter the truck.

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Mr. DeLucia drove the truck and Mr. Gerbasio got into the passenger side of the truck.

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Q Did you see this man Angelo Gerbasio?

19

A Yes, I did.

20

Is he the man standing now?

21

A Yes, sir.

22

MR. LEVIN-EPSTEIN: Indicating the defendant

23

Gerbasio.

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After DeLucia with Mr. Gerbasio drove the truck away from where it was parked, where did they go?

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To the gas pumps that are located just before the gate.

Q Did you observe anything happen with respect to the truck at the gas pumps?

They loaded the truck with gasoline.

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Q Do you recall who it was of the 2 of them that actually filled the truck?

They were both standing at the side of the truck, but Mr. Gerbasio was putting the gas in.

Where was DeLucia when Mr. Gerbasio was gassing

11 12

up the truck?

On the side of the truck.

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After they gassed up the truck who was driving at that time?

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DeLucia.

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Tell us what if anything they did at that point?

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Mr. DeLucia got in and drove the truck, Mr. Ger-

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towards around what they call Federal Circle, up the Van Wyck

basio was in the passenger seat. They departed the airport

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Expressway up the Conduit, next to the Belt Parkway. Proceeded

to Linden Boulevard. Down to Linden Boulevard where it becomes

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Caton Avenue west, on Caton Avenue u.til Caton Avenue becomes

Fort Hamilton Parkway. At Fort Hamilton Parkway the surveill-

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ance was maintained through contact of the different FBI ve-

hicles.

At Fort Hamilton Parkway after a short distance the truck bulled to the side of the road.

- Q What happened there?
- A The truck remained stationary for a short period of time.
  - Q Did Mr. Gerbasio or DeLucia leave the truck?
  - A Not to my knowledge.
  - Q Did you have the truck under observation then?
- 11 A Yes, sir.
  - Q What happened then?
    - A It proceeded on to the Verrazzano Bridge, paid its toll went through and made its first right turn at Bay Street, Tylan Boulevard.

At that point the surveillance cars, we went back down, the truck came back up Bay Street, up the opposite direction it intended to go up the service road on the expressway, there ip Staten Island and made several different turns entered on to the expressway back onto the expressway onto the access road. At this time we stopped at several red lights, the surveillance was continued.

- Q When you say red lights, you mean traffic lights?
- A Traffic lights.
- Q Continue.

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your vehicle? 25

The truck then proceeded and made a sharp left turn, went back under the expressway and headed back towards the city. In other words, it was heading east at this point.

What happened then, sir?

At this point it was decided through communication --

> MR. WASHOR: Objection as to what was decided, Your Honor.

THE COURT: It really, I think it does not matter in this context.

You may answer and continued with your answer.

We decided at this point we would stop the truck.

What was done that you observed, or noted in order to stop this truck?

At this point we put on the siren, put our red light on the vehicle, went alongside the truck and told the truck to stop and we bulled in front of the truck.

Q In other words, your car was directly before the truck?

Yes, sir. A

Q In order to provide what?

A Prevent the truck from going any further.

Q Did you have an occasion at this point to leave

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A Yes.

Are you armed during the course of your official Q duties?

Yes, sir.

Did you withdraw your weapon from your holster at this point?

Yes, sir.

Where did you go with reference to this stopped truck?

> A I went to the passenger's side.

> Did you have a gun in one hand? Q

A Yes, sir.

Q What did you have in the other hand?

My credentials.

Q Says FBI?

> A Says FBI.

Did you have occasion to speak with anybody in Q the truck, either Mr. Gerbasio or Mr. DeLucia?

> A Yes, sir.

Q Whi h one did you sneak to?

Mr. Gerbasto.

23 When you spoke to Mr. Gerbasio did he get out 24 of the truck?

25 A Yes, sir.

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Then you may ask him what was the occasion of that.

MR. LEVIN-EPSTEIN: If he acknowledges giving

THE COURT: Oh, yes.

MR. LEVIN-EPSTEIN: But I wonder if Mr. Washor is opening the door to some serious redirect, a door he may not open.

THE COURT: You can't go back on the express statement.

MR. LEVIN-EPSTEIN: I am not going back on the expressed statement as long as he knows he is taking a chance Mr. Gerbasio is taking a chance.

THE COURT: Within the rules of evidence and only that chance, I am no great believer of the open door.

MR. LEVIN-EPSTEIN: I take no exception to the cross comments now, but I do take exception to the government's being charged with threatening somebody, Mr. Washor said don't threaten us.

> THE COURT: He likes to say things like that. (Whereupon the trial resumed in open court.)

BY MASHOR:

Agent Yoos, is it not a fact that when you went

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from the passenger's side of the car after having advised Mr. Gerbasio of his constitutional rights, brought him to the driver's side of the automobile?

Yes, sir.

And does your -- I am asking you now is it not a fact that you did advise him of his rights again at the driver's side?

Not to my recollection. I advised him the first time.

Q Did you at the driver's side tell him he doesn't have to answer any questions without going through all the rights?

I reminded him to didn't have to make a statement.

What was the eccasion for you to remind him that he doesn't have to make any statement when you were at the driver's side?

A He was standing next to DeLucia.

That was the only reason? Q

A That is correct.

Q No other reason?

MR. LEVIN-EPSTEIN: The witness has answered the question, if coun sel doesn't like the answer he is bound by it.

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THE COURT: Note this point, because I instructed him to the meaning of Mr. Yoos's glance.

(Whereupon the trial resumed in open court.)

MR. WASHOR: With the Court's permission may

I just lead the witness with the next question?

THE COURT: We'll see how far you lead him.

Q Agent Yoos, there came a time when you advised Mr. Gerbasio of his rights on one side of the truck, am I correct?

A Yes, sir.

Q After making him, or giving him those Miranda warnings, you took him to the other side of the truck, am I correct?

A Correct.

Q Nothing occurred coming around from one side to the other, am I correct?

A You're correct.

Q Now, there came a time when you transported Angelo Gerbasio back to FBI headquarters?

A At the resident agency at JFK, yes, sir.

Q Would it be fair to say at that time Mr. Gerbasio was again advised of his constitutional rights?

Yes, sir.

Q Would it be fair to say it was in a room?

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- A Yes, sir.
- Q Would it be fair to say nobody threatened him at that time?
  - A That is correct, sir.
  - Q There were other agents present, am I correct?
- A That is correct.
  - Q Who were the agents present?
- 9 A Special Agent Jules.
  - Q The person at the table at Special Attorney's
- 11 office?
- 12 A Correct.
- Q Would it be fair to say nobody coerced Angelo
  Gerbasio?
- 15 A That is correct, sir.
- As a matter of fact not only was he read his 17 rights, he was asked, shown a niece of paper, was he not?
- 18 A That is correct.
- 19 Q Asked to read it, is that correct?
- 20 A Correct, sir.
- 21 Q After he was asked to read it he was asked to
  22 sign the piece of paper, am I correct?
- A He first was asked if he understood it.
- Q He was first asked if he understood what he read?
- 25 A Correct.

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He was asked if he understood what was read to him about his constitutional rights, is that right?

That is correct.

Then he was asked if he desired to sign the niece of paper, is that correct?

That is correct.

You explained he didn't have to sign it if he didn't want to, is that correct?

Correct.

It was signed in your presence, is that correct? Q

Correct.

Nobody promised him, or threatened him? Q

That is correct.

Nobody made deals with him, am I correct?

Correct.

Nobody coerced him to sign it, am I correct? Q

You're correct.

As a matter of fact you witnessed his signing of the paper, am I correct?

> That is correct. A

You saw him sign his name, am I correct? Q

Correct.

You wrote your name then as a witness to this niece of namer, an I correct?

Yes, sir.

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Would it be fair to say Agent Jules did the same

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thing?

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Correct.

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Would it be fair to say it's marked as Exhibit 5 for identification, would you look at that piece of paper,

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please? Is that your signature on that piece of paper?

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Yes, sir.

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As a matter of fact is that the signature you saw the defendant Angelo Gerbasio sign?

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Yes, sir.

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Is that your brother agent Jules' signature also?

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Yes, sir.

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Q That is the paper we are talking about, is that

correct?

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That is correct.

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MR. WASHOR: We offer it in evidence, Your

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Honor.

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MR. LEVIN-EPSTEIN: Absolutely no objection.

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THE COURT: Defendant Gerbasio's Exhibit A.

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THE CLERK: So marked Defendant's A in evi-

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dence.

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Now, Agent Yoos?

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Yes, sir.

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Q What time would you say you arrested -- formally said Angelo Gerbasio, you're under arrest on the 23rd of October?

A Approximately 9:20 A.M.

Q How long a period of time would you say you were in the area in the street of Staten Island approximately?

5 to 8 minutes, maybe a little longer.

Q What time would you say you got back to the FBI premises?

You mean in the office proper, or parking, or

Q The time you actually got into the premises, approximately how much time?

A Approximately 10 after 10.

Q What time was this consent form signed by Mr.
Angelo Gerbasio?

A It was furnished to Mr. Gerbasio at 10:15 A.M. and was signed at 10:19 A.M.

Q You say 9 minutes after you got in, 9 or 10 minutes am I correct?

A Approximately.

Q If Mr. Angelo Gerbasio after signing this statement, did he tell you that he was willing to make a statement?

MR. LEVIN-EPSTEIN: Your Honor, may we app-

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roach the sidebar?

(Whereupon a sidebar conference was held outside the hearing of the jury.)

MR. LEVIN-EPSTEIN: May I ask the Court if it's counsel's intention to elicit from this witness what Mr. Gerbasio's statement was?

MR. WASHOR: Yes.

THE COURT: You cannot, hearsay it. Because of the truth of the matter asserted and the witness can be sworn.

MR. WASHOR: I do not offer it for the purpose of truth, just the fact that a statement was made.

THE COURT: It's a hopefully self serving hearsay declaration.

MR. WASHOR: Would the Court explain that I cannot elicit the statement because of certain legal rules?

THE COURT: No, because then I would infringe in his right to stay off the witness stand.

MR. WASHOR: I see what you mean, yes. I can see that.

THE COURT: I'll see what you present to the jury. He was willing to talk.

MR. WASHOR: I can ask in fact Mr. Gerbasio

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was questioned and did answer questions and leave it at that.

THE COURT: Better not, because he was indicted.

MR. WASHOR: That fact doesn't bother me.

MR. LEVIN-EPSTEIN: I think it's clear a statement like this is admissible only under certain -it's one, it's a --

THE COURT: It's not admissible and he can't offer it.

You can offer it because it's against him. The adversary can also offer words that came out of his adversary's mouth and then argue if they're admissible or not.

WASHOR: I'll only go so far if I am permitted, was he questioned and give any answer and leave it at that.

THE COURT: Was he interrogated and did he answer and what is it.

MR. WASHOR: That's all, I'll stop there, surely.

(Whereupon the trial resumed in open court.) MR. WASHOR: Can I inquire what government

exhibit the consent form is?

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Jules of the FBI?

THE COURT: Turned out to be defendant Gerbasio's Exhibit A.

Q Agent Yoos, after signing of the consent form would it be fair to say that Angelo Garbasio was interrogated and answered the questions posed to him?

A He answered the questions to the best of his knowledge he told us.

MR. WASHOR: Thank you, no further questions.

MR. SCHACHER: I have no questions, Your Honor.

MR. LEVIN-EPSTEIN: I have no redirect of this witness Your Honor.

THE COURT: You are excused. You can stendown.

MR. LEVIN-EPSTEIN: The government calls as its next witness Government Agent Jules.

(Whereur on the witness was sworn by the clerk of the court.)

THE CLERK: Please state your full name?

THE WITNESS: Francis Jules. J-U-L-E-S. Francis

R. Jules

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q For the record, you are Special Agent Francis

Jules/Dicct 1 occasion to sit down with Agent Yoos and Mr. Gerbasio? 2 3 Yes. And as described during other testimony of Agent Yoos, you have heard Mr. Washor's cross examination of Agent 5 Yoos. He advised him of his rights and so on? 6 7 A Yes. And as I understand a Exhibit A which he waived 8 his rights to remain silent, isn't that a fact? 9 10 Yes. I show Exhibit A to you and ask if it be marked 11 as Government's Exhibit. 12

THE COURT: Joint Exhibit, Government's Exhibit 7 as well as Defense Exhibit.

THE CLERK: So marked Government's Exhibit 7 and Defense Exhibit A.

Q Government's Exhibit 7, is exactly the same exhibit as defendant's Exhibit A. Mr. Gerbasio signed a waiver of those rights. After he signed this waiver of rights you interviewed him, did you not?

> A Yes.

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As a result of that interview was a report or some official record of that interview made?

Yes.

MR. LEVIN-EPSTEIN: May this document he

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marked Government's Exhibit next in sequence.

THE CLERK: Government's Exhibit 8.

MR. LEVIN-EPSTEIN: I ask the Court at this time to look at Government's Exhibit 8 for identification.

Let the record indicate I am showing it also to counsel for Mr. Gerbasio and I show it for the record, Your Honor, to Mr. Schacher.

Q Agent Jules, I show you what has been marked as Government's Exhibit 8 for identification and ask you if this is a photostat of the official report, or part of the report you prepared as a result of that interview with Mr. Gerbasio?

A Yes. It is.

Q Using that report to refresh your recollection about the interview, would you please tell the jury what you said to Mr. Gerbasio and what if anything Mr. Gerbasio said to you in the course of your interrogation of him?

A Mr. G. Dasio stated that on the morning of October 23 he came to work about 7:15. At about 8 A.M. he was asked to help on a truck. He stated that he had no idea where he was going and did not know that the truck contained any freight.

He stated there was some conversation in the truck and he believed he was going for a pickup at some pier in Staten Island.

He then stated he could not furnish any further inform-

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At that point was the interrogation terminated? 0

Yes.

MR. LEVIN-EPSTEIN: Just a moment Your Honor.

Now, following, or perhaps it was before the interview with Mr Gerbasio, did you have an occasion to interview Mr. DeLucia?

I did.

Was that before or after Mr. Gerbasio's interview?

I don't recall.

In the interview with Mr. DeLucia did you also advise him of his rights again?

Yes.

MR. LEVIN-EPSTEIN: I ask this has been marked Government's next in sequence for identification.

THE CLERK: Government's Exhibit 9.

I show you what has been marked G vernment's Exhibit 9 for identification, Agent Jules. And ask you if you recognize that document?

Yes. I do.

Do you recognize that document because of the narticular characteristic on the document?

Yes.

How do you recognize it?

2	Α	Waiver of rights form.
3	Q	How do you recognize this particular document?
4	A	My signature is on the bottom.
5	Q	Do you recall placing your signature on this
6	narticular doc	cument?
7	Å	Yes. I do.
8	Q	Do you recall when that signature was placed on
9	that invoice	of rights form?
10	A	At 10:08 on October 23, 1975.
11	Q	Did you use this form to assist you in advising
12	the defendant	Mr. DeLucia of his rights on that morning?
13	A	Yes.
14		MR. LEVIN-EPSTEIN: Offered in evidence.
15		THE COURT: Received there being no object-
16	ion.	
17		THE CLERK: Now Government's Exhabit 9 in
18	eviden	ce.
19	Q	Agent Jules, were you present earlier in this
20	case testimon	y, when I read into the record certain rights as
21	they appeared	on the form used by Agent Westhoff?
22	A	Yes.
23	Q	Would it be accurate to say that the rights on
24	this form are	exactly the same as the rights I read on the
25	other form?	

Correct.

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Loes thir say waiver of rights?

Yes.

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MR. LEVIN-EPSTEIN: For the record, waiver

of rights.

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Reads as follows:

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I have read this statement of my rights and I understand what my rights are.

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MR. WASHOR: It's in evidence. I object.

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THE COURT: This is the quickest way to pre-

sent it to the jury rather than to pass it through the

ment of my rights and I understand what my rights are,

I am willing to make a statement and answer questions.

I do not want a lawyer at this time. I understand and

know what I am doing, no promise or threats have been

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jury box.

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MR. SCHACHER: I have no objection, Your Honor.

MR. LEVIN-EPSTEIN: I have read the state-

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me. After that waiver of rights is there a signature where I am pointing?

made to me and no pressure or coercion was used against

Yes.

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Was that placed in your presence?

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Yes.

3 By whom?

Mario DeLucia.

Q Mario DeLucia?

Yes.

After Mr. DeLucia's signature, signature and Special Agent Westhoff's signature appears at 10:08 A.M.?

Right.

After Mr. Delucia waived his right to remain silent and after he waived other rights I mentioned, did you have occasion to interview Mr. DeLucia?

Yes.

MR. LEV V-FOSTEIN: I ask this be marked as next -- Government's next exhibit for identification.

THE CLERK: Government's 10 for identificat-

Did you cause to be prepared, or did you prepare an official report summarizing the results and subject matter of that interview with Mr. DeLucia?

Yes.

ion.

I s ow you what has been marked as Government's Exhibit 10 for identification and ask you is that a photostatic cony of the report that you caused to be prepared?

> A Yes. It is.

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MR. LEVIN-EPSTEIN: Let the record indicate I am showing Government's 10 for identification first to counsel for Mr. DeLucia and in addition may the record also reflect I am showing Exhibit 10 for identification to Mr. Washor who apparently indicates he does not want to see it.

> Again? THE COURT:

Again. MR. LEVIN-EPSTEIN:

Utilizing Exhibit 10 for identification, Special Agent Jules, will you please tell the jury and the Court what Mr. DeLucia said in response to your question, and what you asked him on the occasion of this interview of the FBI, on the morning of his arrest?

He stated that he worked the midnight shift at Pan-American cargo building 67, and was in fact in charge of the motor pool. At approximately 7:30 A.M. on October 23 Mario stated that Chris Whelan, who must have been supervisor asked him if he wanted to work overtime and Mario stated he would work. Mario stated he did not know --

Let me interrupt you. Did you say he would, or would not?

He would.

Mario stated he did not know there was any freight in the truck, he then stated that he did in fact load this truck

with freight in the early morning hours of October 23.

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Q Let me interrupt for a minute. Did he change his mind and say anything about the change of mind?

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MR. SCHACHER: I object to that, Your Honor.

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THE COURT: You mean were those two state-

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ments contradictory?

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Are those two statements contradictory?

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Yes. They are.

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Continue?

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He stated he did in fact load this truck with freight in the early morning hours of October 23, and he did in fact move that truck away from door 9 over to the side of the building.

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He stated he could not remember what freight was loaded on this truck nor did he know where the truck -- freight was destined to. He also stated that all he could say was that he was told to make a pickup from a pier in Staten Island and could not furnish any further information.

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Q At this point did you terminate the interview

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MR. LEVIN-EPSTEIN: No further questions.

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CROSS EXAMINATION

with Mr. DeLucia?

EY MR. WASHOR:

MR. WASHOR: May we have a bench conference for a moment, Your Honor. It could save a lot of time.

THE COURT: Yes.

(Whereupon a sidebar conference was held outside the hearing of the jury.)

MR. WASHOR: Your Honor, it's my intention to offer a 302 of Gerbasio's statement in evidence. I didn't want to do it without having a bench conference first, in its redacted form first.

MR. LEVIN-EPSTEIN: On what basis?

MR. WASHOR: It's an official document.

MR. LEVIN-EPSTEIN: He read it into the record.

THE COURT: He didn't. The jury doesn't know that.

MR. LEVIN-EPSTEIN: I'll ask him to read it if it pleases the Court.

MR. WASHOR: This is in the question of -- before I offer in evidence I thought I owed a duty.

THE COURT: What we're up against is the rule, I have the rule, I think, come in as past recollection and under the new rule they say you have to read it in, you cannot mark it. It sounds odd because it's not what the New York rule was, but I think the philosophy behind

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it is, you're really looking for the live testimony of the man and this statement that he reduced to writing x months ago is the record of what he then said, so you want it said now and to preserve its stateness as a said thing, rather than ask the intelligible black and white and record the statement, that is not the way you have thought about it.

8035, I can never remember if there is an A in there or not.

MR. WASHOR: What about a record made in the ordinary regular, ordinary course of business?

THE COURT: I am dying for years to get all 302's read in.

MR. WASHOR: I am offering this one in, I don't see where there is and I'm impounded of it going in, there is no hearsay.

MR. LEVIN-EPSTEIN: There is no need for it either.

THE COURT: There doesn't have to be.

MR. LEVIN-EPSTEIN: It's cumulative.

THE COURT: He says under 8036.

MR. LEVIN-EPSTEIN: I understand what he is saying.

THE COURT: If he said regular course of FBI

business.

MR. LEVIN-EPSTEIN: Let's look at the caption which says hearsay availability of declarent immaterial.

MR. WASHOR: It's immaterial whether he is here or not.

THE COURT: Is available.

MR. LEVIN-EPSTEIN: I understand. I might have no objection if a couple of questions are answered. Is it Mr. Washor's intention to offer the entire 302, or the first page of the 302?

THE COURT: In one of the 302's ends short of the personal data indicating that there is at least one.

MR. WASHOR: Let's get 302 in question so we can show it to the Court.

THE COURT: The whole 302 may have a number of pages.

MR. WASHOR: I think it only has one.

MR. LEVIN-EPSTEIN: Your Honor, may I point out to the Court that Government's Exhibit 8 for identification, I take it is a document, Mr. Washor is referring to?

MR. WASHOR: Interview and statement by Agent Jules.

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THE COURT: And then read it to the jury?

MR. LEVIN-EPSTEIN: You're going to stop at this point, stopping right there.

MR. WASHOR: I want to tell you something, has anyone of the agents draw a gun if I continue I have to follow the Court's instructions.

MR. LEVIN-EPSTEIN: The government is satisfied.

MR. WASHOR: At this time I respectfully offer in evidence the official record made in the regular course of business.

MR. LEVIN-EPSTEIN: I'll object, I'll ask that it be offered.

THE COURT: You offer it in evidence?

MR. WASHOR: 8, Government's 8 for identification.

MR. LEVIN-EPSTEIN: No objection.

THE CLERK: Exhibit 8 in evidence.

MR. WASHOR: With the Court's permission may

I read it?

THE COURT: Yes.

MR. WASHOR: Angelo Gerbasio read his rights as they appear on a waiver of rights form, stated that he understood his rights and he signed this form. This

document is dated October 23, 1975. Gerbasio stated that on the morning of October 23, 1975 he came to work about 7:15 A.M. and about 8 A.M. was asked to help on a truck. Angelo stated he had no idea where he was going and did not know the truck contained any freight.

Angelo stated that there was some conversation in the truck and he believed that he was going to a nick up at some pier in Staten Island. Angelo stated he could not furnish any further information. That is statement, Your Honor, cross examination of the witness.

THE COURT: Mr. Schacher, do you have any questions to ask Mr. Jules?

MR. SCHACHER No, Your Honor.

MR. LEVIN-EPSTEIN: No further questions, Your Honor.

The government calls as its next witness Mr. Chris

THE COURT: Is it Walland or Weyland?

MR. LEVIN-EPSTEIN: It's a tynographical error, that will be clarified in a minute.

(Whereupon the witness was sworn by the clerk of the court.)

THE CLERK: Would you state your full name

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for the record please?

THE WITNESS: Christie Weilan.

## DIRECT EXAMINATION

## BY MR. LEVIN-EPSTEIN:

Would you take advantage of the microphone in front of you so we can hear you clearly?

> A Yes.

For the record, for the jury's benefit will you state your full name?

Christie Weilan.

Your last name is shelled how? Q

W-E-I-L-A-N.

Not W-H-A-L-A-N?

No.

There has been some confusion, there has been a misspelling of your name somewhere else, how do you pronounce your last name?

Weelan.

What does your job handle? Q

I am a dispatcher for Pan-American motor pool. A

How long have you been employed as a dispatcher for Pan-American motor nool?

About 6 years.

Prior to that time were you also employed by Q

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Q Did you have any further conversation with Mr. DeLucia at this point?

A No.

To your knowledge did he go home, or leave the facility?

A I don't know. I went for a cur of coffee.

Q That was the last time you saw him on that day,
Mr. DeLucia October 23rd?

A Yes.

Q Some period of time after this conversation with Mr. DeLucia, was there a time you had a contact of communication with the gentleman on his right, Mr. Gerbasio?

A Yes.

Q Did you have a conversation with him?

A Yes. We said good morning.

Q After he said good morning did he say something to you and did you respond?

A. Yes.

Q What did you say to him and what did he say to you?

A He said he was going to a union meeting.

Q At what time did you have the conversation which began with Mr. Gerbasio saying to you he wanted to go to a Union

		Weilan/Direct 224
1		65.2
2	meeting?	
3	A	7:45.
4	Q	What if anything did you say to him after that?
5	Α	Go ahead.
6	Q	We that part of a contract?
7	A	Yes.
8	Q	Requirement?
9	A	Yes.
10	Q	You said Mr. Gerbasio had something to do with
11	the union, di	d you not?
12	A	Yes.
13	Q	What is his position?
14	A	Senior Steward.
15	Q	He is a representative of the workers?
16	A	Of our motor pool people.
17	Q	Do you know whether or not in fact there was a
18	union meeting	g that morning?
19	A	I couldn't tell you.
20	Q	Did he tell you where he wanted to go to attend
21	this union me	eeting?
22	A	Yes.
23	Q	Where?

Hangar 14.

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And where with respect to Hangar 16 which is 1 Q

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2	think you said	your office, was, is that where you had the
3	conversation, ha	angar 16?
4	A No	o.
5	Q W	here did you have the conversation?
6	A C	argo building 67.
7	Q W	ith respect to cargo building 67 by the way,
8	is that where M	r. Gerbasio was scheduled to work that morning?
9	A Y	es.
10	Q W	here was hangar 14, where the union meeting
11	was held?	
12	Α	On the other side of the field.
13	Q 3	Yes. It's not outside a fence anywhere is it?
14	A P	No.
15	Q I	Do you have to drive to you have to drive to
16	get to hangar	16 from cargo building 67?
17	A	Yes. It's a long walk, you have to drive.
18	Q	Approximately how long a drive would you say?
19	A	10 minutes.
20	Q	When Mr. Gerbasio said to you I want to go to
21	the union meet	ing you said go ahead and he left your presence?
22	A	Right.
23	Q	Do you know where he went?
24	A	No, sir.
25	Q	Did you attend that union meeting?

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No, sir.

Approximately what time did he leave you, sir?

A Well, like I say I went for a cup of coffee, I didn't see if he left at 8 or a quarter to 8.

MR. LEVIN-EPSTEIN: 1 hank you very much, no further questions.

CROSS EXAMINATION

BY MR. WASHOR:

Q Mr. Weilan, do you know what a time card is at the Pan-Am building?

Yes.

MR. WASHOR: Can we have this exhibit marked for identification?

MR. LEVIN-EPSTEIN: No objection to it being marked in evidence.

THE CLERK: Now Defendant's Exhibit C in evidence.

MR. WASHOR: Can we have a stipulation this is the time card of Angelo Gerbasio from Pan-Am building with motor pool department 774. -

MR. LEVIN-EPSTEIN: Indicating he was a member of the motor mool, correct?

MR. WASHOR: Correct. Reflecting that time check in on the 23rd of October 1975 was about 6:58 A.M.

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MR. LEVIN-EPSTEIN: So stipulated Your Honor,

no objection to it being entered in evidence on that

basis.

Q Now, Mr. Weilan. Mr. Gerbasio described some of his functions, some of the things he does at your request being the boss, on direct examination.

Ever act as a helper in a truck to your knowledge?

Yes.

That falls within his function, am I correct?

Right. A

You are a member of the union yourself, am I correct?

> A Yes.

You said he was a representative of yours and others at this union?

> A Yes.

Q These union meetings occur frequently, am I correct?

> A Yes.

Most meetings occur 10:30, 11 o'clock, 2 o'clock in the afternoon?

Possibly.

There's no union meeting you recall that occur 7:30 in the morning, am I correct?

		SCS
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2	A	They can occur at any time.
3	Q	You never went to a union meeting?
4	A	No.
5	Q	You don't know what time they occur, am I correct?
6	A	Right.
7	Q	Once Mr. Gerbasio tells you there's a union meet-
8	ing and you t	ell him he can go, that means you won't have ass-
9	igned him any	where, am I correct?
10	A	Yes.
11	Q	Until after the meeting, am I correct?
12	A	Yes.
13	Q	Did he tell you what time he expected to be back?
14	A	No, sir.
15	Q	He had no idea?
16	A	No, sir.
17		MR. WASHOR: If I can confer with counsel for
18	a mon	ment.
19		THE COURT: Yes.
20	Q	This hangar 14 is on the property of Pan-Am, or
2	JFK, am I co	orrect?
2	2 A	Yes.
2	3 Q	Is this where all the meetings are held to your
2	4 knowledge?	
2	5 A	No. They vary, sometimes they're held in another

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- But always in the vicinity, am I correct?
- Yes.
- Now, Mr. Weilan if Mr. Gerbasio were to have been scheduled for a meeting at 10:20 or 11 o'clock at the union and he had told you at 7:45 A.M. that he had a meeting you would not assign him until he completed going to the union meeting, am I correct?

MR. LEVIN-EPSTEIN: It calls for a fact not in evidence, speculation.

THE COURT: I think he's asking what the practice is with respect for earlier requests for later meetings.

MR. LEVIN-EPSTEIN: Objection, improper foundation.

THE COURT: He says you better ask a foundation question.

Q Mr. Weilan, there are occasions when Mr. Gerbasio would ask you to go to a meeting, am I correct?

> Yes. A

During the years of employment you were his super-Q visor?

Yes.

At times you would ask him to go to the meeting, Q

'		· . · ,
2	you would hav	e no particular time as to the time of the meeting?
3	A	Yes, sir.
4	Q	You could say you didn't even care in a sense?
5	A	Yes.
6	Q	No matter what period of time that he was gone
7	he would not	be assigned if he made a request to go to a meet-
8	ing, am I con	rect?
9	A	No, sir.
16	Q	He would be assigned?
11	A	No, sir.
12	Q	He wouldn't be assigned?
13	A	No, sir.
14	Q	That was the general practice that occurred when
15	Mr. Gerbasio	would ask you permission to go to a meeting?
16	A	Yes.
17	Q	Didn't he ask you to not assign him until he went
18	to themeeting	gs?
19		MR. LEVIN-EPSTEIN: Objection.
20		THE COURT: You covered the whole idea.
21	Q	During the time period when he would make the
22	request that	he would have a meeting, say in the morning or

23

Yes. He would be.

afternoon, was he accountable for his time to you?

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Now, let's assume that he requested as he did

'				14
2	here at about	7:45 A.M. on Octob	er 23, 1975.	That he not be
3	assigned becau	se he had a meetin	g, right?	
4	A	Right.		
5	Q	Let's assume the m	eeting was 10	:30, 11 o'clock.
6		MR. LEVIN-EPSTEIN:	How can	we assume any-
7	thing o	f facts not in evi	dence?	
8		THE COURT: He	can, overrul	ed.
9	Q	Assuming 10:30, 11	o'clock in t	he morning. What
10	would Mr. Gerb	asio be assigned t	o between the	time he requests
11	that he go to	the meeting and th	e time the me	eting actually
12	occurs?			
13	A	A short one, not t	coo far.	
14	Q	And if he were not	assigned to	a short run?
15	A	He would be the of	fice man.	
16	Q	But if		
17		MR. WASHOR: No	further ques	tions.
18	Q	By the way, there	is no question	n in your mind
19	that Mr. DeLuc	cia had the same ca	nacity you di	d, am I correct;
20	simply the nig	tht shift?		
21	A	Right.		
22	Q	What about when De	Lucia did ove	ertime, was he in
23	the same canad	city as you?		
24	1 .	V1		

What capacity?

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boss.

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A Still have his title, but I would still be his

Q He could direct comle I sumpose, but would clear it through you?

A No.

Should clear it through you?

MR. LEVIN-EDSTRIN: Objection.

an assignment on an overtime situation while you were the boss so to speak, he should get your permission first, am I correct?

A Yes.

Honor?

MR. WASHOR: All right, thank you.

No further questions.

MR. SCHACHER: Can I approach the sidebar, Your

(Whereupon a sidebar conference was held outside the hearing of the jury.)

MR. SCHACHER: Contemplated using experts (sic) for some time, can we have entil Monday morning, sir?

MR. LEVIN-EPSTEIN: I would object.

THE COURT: 11's after 5 o'clock now.

stand that the Court has these jail cases shead of it,
Your Honor the case is nowing slower than we anticipate!

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by the prosecutor, that I suppose it gratuitous.

MR. LEVIN-FPSTEIN: If Mr. Washor doesn't

know I object to the objection.

THE COURT: This is senseless interchange, it must stoo on both sides. Proceed.

Q At any time, October 23, 1975 did you assign Mr. Gerbasio to get into a truck with or without anybody else and go to Staten Island?

No, sir.

Q At any time on October 23 1975 did you assign Mr. Gerbasio with or without anybody else to help as a helper on a truck going to Staten Island?

> No, sir. A

Q At any time on October 23, 1975 and anybody else to go to Staten Island with a truck full of leather coats?

No. sir.

Q Did you ever send Mr. Gerbasio to go to Staten Island to make a nickun?

> No, sir. A

In fact it was your job to assign Mr. Gerbasio Q to what he was doing?

> Yes. A

And you never told him to go to Staten Island?

No, sir. A

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Q There is no doubt, is there that Mr. Gerbasio told you he had to go to the union meeting, he had to go to a union meeting at 7:45?

A Yes, sir.

Q As you sit here today, do you recall what time if any he told you the union meeting was to be held?

A No, sir.

Q By the way Mr. Weilan, you testified in response to Mr. Schacher's question, on occasion you yourself worked as a cargo handler or even as an assistant to a cargo handler, right?

A Yes.

Q There have come occasion when you carried cargo and assisted in that respect?

A Yes, sir.

When it became necessary, right?

A Right.

Q Did you do this for free, out of the goodness of Pan-American?

A No.

Q You were paid for it, weren't you?

A Yes.

There was a record of it?

A Yes.

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Is there a record anywhere in the corporate structure of Pan-American that shows on October 23, 1975 either or both of these men acted as cargo handlers, or anything of the like going to Staten Island?

MR. WASHOR:

Objection.

THE COURT:

Overruled.

THE WITNESS:

No, sir.

To your knowledge anywhere in the record of Pan-Am Airways, any form, is there a record of getting haid for the trin they made to Staten Island on October 23, 1975, sir?

> A No, sir.

> > MR. WASHOR:

Objection.

THE COURT:

Overruled.

THE WITNESS: No, sir.

To your knowledge did anybody in Pan-American or anywhere else ever authorize, or instruct Angelo Gerbasio and or Mario DeLucia to go to Staten Island in that truck with those leather coats on October 23, 1975?

> No, sir. A

Is there anybody else that may have authorized them to do that, or told them, or instructed them to do it to your knowledge?

> A No.

Q Nobody else?

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A No.

It would have been your job, is that right?

Yes.

And you don't do it?

No, sir.

MR. LEVIN-EPSTEIN: Your Honor, at this time I would like to offer as a joint exhibit Defense Exhibit in evidence and Government's Exhibit in evidence next in sequence.

THE COURT: 11.

THE CLERK: So marked Defendant's D in evidence also Government's 11 in evidence

Q At any time on October 23, 1975 did you ever present Mr. Gerbasio and or Mr. DeLucia with a set of keys to the truck in which they were arrested?

MR. WASHOR: Objection.

THE COURT: Whose task was it to issue the

keys?

MR. LEVIN-EPSTEIN: Your Honor, I am merely following up the question by counsel.

THE COURT: 1 know.

Whose job was it if it were to be done to give keys, or present a driver with keys to go on a job?

A Myself or my assistant.

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them un?

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- Q What is his name?
- Marusa.
- M-A-T-U-S-A?
- Yes.
- To your knowledge did you on October 23, 1975 present either of these two defendants with the keys to that truck?
  - No sir.
- To your knowledge did your assistant Mr. Matusa present either defendant with the keys to that truck?
  - No, sir.
- Are the keys available for someone to pick up even if you don't give it to them?
  - Yes. On a board.
  - Under lock and key? Q
  - A No, sir.
  - On a safe or cabinet of some kind?
  - No, sir. A
  - Behind bars where you can't get to them? Q
  - Yes, sir.
  - Anybody that has access to the office can nick Q
- - THE COURT: The question is that they're on
  - a board which is accessible to drivers.

-	Weilan/Redirect-Recross By Schacher 264
1	Recross By Mr. Washor
2	Q Was it accessible to Mr. DeLucia?
3	A Yes.
4	MR. LEVIN-EPSTEIN: I'm completed Your Honor.
5	RECROSS EXAMINATION
6	BY MR. SCHACHER:
7	Q Mr. Weilan, in order for a person to receive
8	money, or pay for overtime they would have to get the time
9	card to consider whether he gets paid or not, right?
10	A Yes, sir.
11	RECROSS EXAMINATION
12	BY MR. WASHOR:
13	Q Do you know Bill Hudson?
14	A Yes, sir.
15	Q Do you know Tony Matusa?
16	A Yes, sir.
17	Q Do you know Artie Dinger?
18	A Yes, sir.
19	Q Do you know Victor Barton Bruiser?
20	A Yes, sir.
21	Q Do you know these people?
22	A Yes.
23	Q Have they made assignments to people in your
24	absence, sir?
25	A Just Matusa.

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He is the only one? Q

Yes, sir.

MR. LEVIN-EPSTEIN:

Matusa. M-A-T-U-S-A.

000

Is he available at the Pan-American?

Yes, sir.

When an assignment such as this is made by either yourself or Mr. Matusa as you say, it's logged in the book?

Yes, sir.

Are there any exceptions to that policy?

No, sir. A

Is that the basis on which the time card is pre-

pared?

Q

A

Yes.

Is that the fact, the basis these neople are haid their wages and overtime?

> A Yes.

When a driver is assigned, sir is the helper also assigned?

No, sir.

As a matter of fact the driver is the one that is recorded in the log book, right?

Yes, sir.

Q And he can pretty well pick the helper without clearing you?

A Yes.

else?

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MR. WASHOR: He didn't tell you what time the meeting was, am I correct?

THE WITNESS: Yes, sir.

MR. WASHOR: No further questions.

MR. LEVIN-EPSTEIN: No further questions.

THE COURT: You may step down, we will recess

now.

MR. LEVIN-EPSTEIN: I was going to expedite something.

THE COURT: Proceed.

MR. LEVIN-EPSTEIN: At this time the --

THE COURT: We'll adjourn now until 10 o'clock Monday morning, please do not discuss the case with one another or anyone not on the jury until it's given to you to decide.

(Whereupon at this time the court recessed until May 10, 1976.)

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MR. LEVIN-EPSTEIN: Your Honor, I have not had an opportunity to talk to the two people that arrived.

THE COURT: We'll have a short recess.

(Whereupon a short recess was taken.)

(Whereupon the jury resumed in open court, jury present.)

MR. LEVIN-EPSTEIN: May we proceed Your Honor?

THE COURT: Yes.

MR. LEVIN-EPSTEIN: The government calls as its next witness Mr. Anthony Matusa.

(Whereupon the witness was sworn by the clerk of the court.)

THE CLERK: Would you state your name, sir?

THE WITNESS: Anthony Matusa.

THE CLERK: Would you spell your last name?

THE WITNESS: M-A-T-U-S-A.

#### DIRECT EXAMINATION

#### BY MR. LEVIN-EPSTEIN:

Q Good morning ladies and gentlemen. Mr. Matusa, if you keep your voice up or if you prefer use the microphone in front of you so the jurors here at the last end of the jury box will hear. Once again will you tell us your name?

A Anthony Matusa.

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Are you employed? Q

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Yes.

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What is your occupation?

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Chauffeur in Pan-American.

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As a chauffeur, as you described it in Pan-American, do you work along with a particular group or section at Pan-American?

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A Yes. Motor Dispatch Center.

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Is that the same dispatch center where Christie

Weilan works?

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Yes.

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Do you know Mr. Weilan?

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I am lead man same as Mr. Weilan.

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Would you work along with Mr. Weilan when he

does his job as lead man?

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Yes.

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Do you work a particular shift, sir? Q

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Yes. Day shift.

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When to when?

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7:30 to 4.

than one person speaking at once.

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Let me finish my question so the reporter can get every word down clearly. It's difficult to take down more

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During the course of your duties as a lead man with Mr.

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Weilan -- by the way, how long have you been doing that?

A I have been employed by Pan-American since February 16, 1961. I have been a lead man for about 6, 7 years in that neighborhood.

Q During the course of your employment as lead man have you become familiar with certain documents and paper work that is prepared by you as part of your job?

Yes, sir.

Are these Pan-American documents and records of Pan-American?

A Yes, sir.

MR. LEVIN-EPSTEIN: I ask this be marked next in sequence for the government.

THE CLERK: Government's Exhibit 12 for identification.

Q Mr. Weilan, I beg your pardon, Mr. Matusa, I show you what has been marked for identification as government's 12 and ask you, do you recognize that document?

Yes, sir. A

Q Is that document or documents such as that one kept in the ordinary course of business of Pan-American Airways?

> Yes. A

Is that document, the one marked government's 12 0

11	****
	Matusa/Direct 307
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2	A I'd say in the neighborhood of 34 drivers.
3	Q Are you saying that from an independent recoll-
4	ection, or reference to that document?
5	A This document should show every man that we have
6	in the day shift.
7	Q Are you familiar with the name Mario DeLucia?
8	A Yes, sir.
9	Q Do you know a man by that name?
10	A Yes, sir.
11	Q Do you see him here in court?
12	A Yes, sir.
13	Q Would you point him out for the record?
14	A The gentleman that stood up.
15	Q Do you know a man by the name of Angelo Gerbasio?
16	A Yes, sir.
17	Q Do you see him in court?
18	A Yes, sir.
19	Q Angelo is sitting next to Mario, the man that
20	just stood up.
21	MR. LEVIN-EPSTEIN: The defendant Gerbasio
22	Your Honor.
23	Q Both these men were part of the ground transport-

ation unit at Pan-American, to your knowledge?

Yes, sir. A

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- Is Gerbasio part of your unit? Q
- Yes, sir. A
- Was he on October 23, 1975? Q
- Yes, sir, he was. A
- Was Mr. DeLucia part of your unit? Q
- He is midnight shift. A
- Just prior to yours? Q
- The shift we relieved, yes.
- Now, in the regular course of business the regular course of your duties at approximately what time, or exactly what time if you can say does your shift relieve Mr. DeLucia's shift?
- We start work at 7:30, Mr. DeLucia works until 8 o'clock.
  - Q Overlap?
  - Half hour overlap.
- Could you tell us please, the jury and the Court what is reflected generally meaning on the assignment sheet, Government's 12 in evidence?
  - I didn't quite get that, sir.
- What is normally reflected on an assignment sheet such as the one you're holding in your hand, what can you get from that sheet?

THE COURT: What is recorded on it?

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Could you tell us which men were working?

THE WITNESS: I can tell you where the men were

Yes.

sent.

Q Could you tell us in other words, where they were sent, by whom, by the way --

A Either by Mr. Weilan or myself.

Q Is there anybody else besides yourself and Mr. Weilan who might assign men in your shift in your job to do particular assignments?

No. There shouldn't be.

Directing your attention to Government's 12 now in evidence, could you tell us please, sir, whether anywhere in that sheet you see the name Mario DeLucia or --

Not on this sheet.

Q What does that mean to you, sir?

It means he wasn't put on a job in this shift.

Q Means he wasn't paid for working during the 8 A.M. shift on October the 23rd; would that be fair; would it be fair to say that the absence of Mr. DeLucia's name on that sheet indicates to you that he didn't work as part of your shift on October the 23rd, 1975?

A He worked 8 o'clock in the morning so on this thing here, this is made up earlier, it's not on this sheet.

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He didn't work on that shift? 0

MR. SCHACHER: That is not what he said.

MR. LEVIN-EPSTEIN: I am trying to elicit

from the witness that --

THE COURT: You asked him about Mr. DeLucia

is that right?

THE WITNESS: Yes.

THE COURT: And this is what Government's

Exhibit 12 is, what sheet the day shift or night shift?

THE WITNESS: Day shift sheet.

THE COURT: All right, now.

MR. LEVIN-EPSTEIN: Thank you Your Honor.

Now, do you see the name Gerbasio on this sheet?

Yes, sir.

Let me interrupt for a moment. You started to say a moment ago when the sheet was prepared, describe for the jury and the Court when all the names of the men you see on this sheet were placed on that sheet?

The sheets are usually made up Thursday or Friday before time.

What is the date? Q

October 23.

About a week before that day rather? Q

A In the neighborhood, yes.

Q Now, do you see the name Gerbasio on that sheet anywhere?

A Yes, sir.

Q Could you tell whether the name Gerbasio appears beneath any particular --

A He is down as a standby driver.

Q What is a standby driver?

A Any phone calls come in certain work comes up
we send him out on it. On this one here many times we get -these assignments are fixed assignments, we have these every
day. The other assignments come in on phone calls and we
send a standby driver on them.

Q In other words, if I may approach you and indicate, pardon me ladies and gentlemen.

Where I am pointing here at the uppermost portion of the form, this is what you call fixed assignments?

A That is right.

Q And beneath here under the heading Standby Driver (Random Assignment) where the name Gerbasio appears, that is what you call the standby drivers?

A Right.

Q They don't have fixed assignments?

A Right.

Q Mr. Gerbasio on October 23, 1975 didn't have a

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particular assignment?

Not fixed, no, sic.

Do you see a notation next to the name Gerbasio?

Yes, sir. A

What is the notation?

54. A

What does the number 54 mean?

Union business. A

Tell the jury when the number 54 was placed next to Mr. Gerbasis name?

The morning.

What morning? Q

October 23.

1975? Q

Right.

When Mr. Gerbasio's name was first placed on this sheet approximately a week before, there was no notation there?

No, sir. A

Q Do you have any personal knowledge how the notation 54, meaning union business came to be placed next to Mr.

Gerbasio's name? 23

> It had something to do with the union that he was our senior steward, he would come down and tell us he has

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a union meeting and we put him on 54 time.

Q It is a phrase you use to describe a particular code meaning union business?

A That is right, sir.

Q You knew Mr. Gerbasio was a member of that union, did you not?

A Yes, sir.

Q And so, would it be fair to say that Mr. Gerbasio was carried or noted as being involved with union business during that shift?

A Yes.

Q Approximately, what time, if you can recall, if you can tell the jury on that day was the number 54 placed next to Mr. Gerbasio's name?

A It had to be somewhere after 7:30 in the morning.

Q Could you tell the jury what is the latest time that it could have been placed there, if you know?

A During the day, you couldn't tell when it's bound to come up.

Q So, it could have been any time during that shift?

A Yes.

Q About sometime after 7:30?

A That is right.

Q Do you have something to do with the union that

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1		<b>c</b> 90
2	Mr. Gerbasio	is shop steward?
3	A	I am a member.
4	- Q	Do you attend all the meetings of that union?
5	A	No, sir.
6	Q	Attend some?
7	A	None. Just pay my dues.
8	Q	Is there any notation on Government's 12 in
9	evidence whi	ch would indicate overtime for anybody?
10	A	No, sir.
11	Q	Nobody at all?
12	A	On this sheet there is no overtime.
13		MR. LEVIN-EPSTEIN: I ask this be marked
14	gover	nment's next in sequence for identification.
15		THE CLERK: Government's Exhibit 13 for ident
16	ifica	tion.
17	Q	By the way, do you see your own name on Govern-
18	ment's 12?	
19	A	Yes. On top.
20	Q	Both you and Mr. Weilan are lead men on this
21	shift?	
22	. A	That is right.
23	0	I show you what has been marked Government's

13 for identification. Do you recognize that document first

25 of all?

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He is lead man.

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Q As you have testified before this shift as reflected in Government's 13 in evidence ended at approximately 8 A.M. in the morning, is that a fact?

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A Yes, sir.

Q Is there any reflection on Government's 13 in evidence that anybody was working past that shift?

A No, sir.

Q Is there any indication on Government's 13 in evidence that Mario DeLucia worked past that shift and worked overtime?

A No, sir.

Q Is there any indication in either of these sheets that either Mr. Gerbasio or Mr. DeLucia was working for Pan-American and getting paid during the hours of 8 A.M. on October 23, 1975?

A On a day shift you have got Mr. Gerbasio.

Q In the capacity of union business?

A Right.

MR. LEVIN-EPSTEIN: No further questions.

CROSS EXAMINATION

23 BY MR. WASHOR:

Q Good morning, Mr. Matusa.

A Good morning.

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Mr. Matusa, Government's Exhibit 12 the assignment sheet showing Mr. Gerbasio's name, scheduled to work on October 23, 1975. You don't know when his name was put on there, am I correct?

His name was put on here the same as the others.

You don't know what date it was put on, do you?

Exactly, no, sir.

When his name is put on it's put on -- you have a standby driver, am I correct?

Yes, sir.

But also isn't there a notation next to standby driver, random assignments?

Yes, sir.

That means Mr. Gerbasio gets random assignments when he is on union duty, am I correct?

Correct. I didn't get that sir.

Because he is a union member his name is not on the assignment sheet for specific jobs, am I correct?

Yes, sir. A

He is put on the standby status, am I correct?

Yes, sir.

And he is picked up and assigned random jobs, am I correct?

Yes, sir. A

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Q Jobs that would not necessarily take an entire day, am I correct?

A Yes, sir.

Small or short jobs, am I correct?

A Yes, sir.

Q So, he would be available for meetings at the union, am I correct?

A Yes, sir.

Q And you knew Mr. Gerbasio to be a representative for the union meetings, am I correct?

A Yes, sir.

Q The designation number 54, that is placed on the sheet either by yourself or by Mr. Weilan, am I correct?

A Yes, sir.

Q Can you, by looking at those two numbers, 54, tell whether it's your handwriting or Mr. Weilan's?

A Well, I have got a different handwriting than Mr. Weilan, Mr. Weilan put this number down.

Q In other words it's not your handwriting, but Mr. Weilan's handwriting?

A Yes, sir.

Q You say number 54 reflects the fact that Mr. Gerbasio had told Mr. Weilan there is a union meeting that day?

A Yes, sir.

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truck with or without somebody else to Staten Island as one of these random assignments on October 23, 1975, either you or Mr. Weilan would have assigned him to do it, right?

Yes, sir.

Q If Mr. Gerbasio had gone off to a union meeting or to take care of union business it still would have been either you or Mr. Weilan would say to him when you're through with union business then go to Staten Island?

MR. WASHOR: Objection.

THE COURT: Do you understand the question?

THE WITNESS: No.

MR. LEVIN-EPSTEIN: I'll rephrase it.

Once Mr. Gerbasio might have said to you I have a union business. Would it have been the normal course of the operation of your section for him to go over on his union business and then go over -- off on some assignment without you knowing about it afterwards?

It's a possibility, yes.

Who would have told him to go then?

A He might have gotten an assignment before he went to the union business, sometimes we have to take a person to a bank, he'll go down and take care of his business and take them to a bank.

Q He would have gotten his assignment before he

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No, sir.

took care of his union business, by who?

A By Weilan or myself.

Yes, sir.

By either you or Weilan?

Pan-American, drive with it to Staten Island, sir?

MR. WASHOR: I object, two questions, one that he can recall and two that he gave him the assign-

Did you give him any assignment on that morning,

Do you recall giving him the assignment?

either from reference he should get in a truck belonging to

No, sir.

ment.

Did you have any recollection whatsoever of giving him that assignment?

A No, sir.

Did you give him that assignment?

A No, sir.

Could you tell from these notes whether you gave him that assignment?

A No, sir.

In fact he never was assigned to go to Staten Island tht day, is that correct?

MR. WASHOR: Objection.

THE COURT: He already testified to it.

MR. LEVIN-EPSTEIN: I withdraw the question.

Q Do you know from your own knowledge, perhaps approximately how far it is from JFK airport cargo building 67 to Richmond County New York or Staten Island?

A I wouldn't roughly know, sir.

MR. LEVIN-EPSTEIN: No further questions.

MR. WASHOR: No further cross.

MR. SCHACHER: No further cross.

MR. LEVIN-EPSTEIN: I'll ask Agent Jules to get the next witness.

Government calls Mr. William Hudson Your Honor.

(Whereupon the witness was sworn by the clerk

of the court.)

THE CLERK: Will you state your name for the record please?

THE WITNESS: William J. Hudson, H-U-D-S-O-N.

## DIRECT EXAMINATION

#### BY MR. LEVIN-EPSTEIN:

Q Mr. Hudson, keeping your voice up so the jurors at the end of the box can hear you, or if you prefer using the microphone.

Q What are your duties?

A Manager of Ground Transportation Pan-American.

1.	Hudson/Direct 325
2	Q Where are you located for that job?
3	A Hangar 16 Kennedy.
4	Q Are you familiar with the defendant in this case
5	Mario DeLucia and Angelo Gerbasio?
6	A Yes, sir.
7	Q Do you know them both?
8	A Yes, sir.
9	Q Do you know them both to work for Ground Trans-
10	portation at Kennedy Airport?
11	A Yes.
12	Q In your capacity what is your title again,
13	sir?
14	A Manager Ground transportation.
15	Q As manager, are you considered as part of manage
16	ment or labor?
17	A Management.
18	Q Do you have in your capacity as manager anything
19	to do with the transit workers union in the sense that you
20	negotiate, or have conversations with them?
21	A Yes.
22	Q Are you, Mr. Weilan, Christie Weilan's immediate
23	supervisor?

24 A No.

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Q One of his supervisors?

# Hudson/Direct

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A Yes.

Q One of the supervisors of Mr. Matusa who just left the courtroom?

Yes, sir.

Q You're familiar with the looks, records, documents having to do with ground transportation at Pan-American?

A Yes, sir.

Q Do you recognize Government's Exhibit 12 and 13 as daily assignments of Pan-American?

A Yes.

Q Do you understand the significance of these two documents, I don't mean with respect to this case, with Pan-American what the information is on them?

Right.

Q Directing your attention to October the 23rd 1975, sir, were you working on that day?

A Yes. I was.

Q In the capacity of manager of ground transportat-

A Yes.

When you came to work that morning, sir, could you tell this jury to the best of your recollection what your schedule was to be; in other words, what was your job to be among other things when you got to work that morning?

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We were supposed to have a meeting with the inventory to solve a problem.

Was this a regular scheduled meeting?

A No.

Q

Q

When you say we, who do you mean, we?

Myself, my boss. A

What is your boss's name? Q

Hillis. James Hillis. A

Who else is supposed to attend this unscheduled

union meeting?

Q

Q

A

A Angelo Gerbasio.

Q The defendant here?

Yes.

In the capacity of shop steward? Q

A Yes.

When you arrived at work that morning, approximately what time did you get there?

A A quarter to.

Is that your normal and regular practice?

Normal, yes. A

Where is your office, sir?

A Now?

Q Then?

It was in the cargo building.

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Yes. A

Did you call him or did he call you? Q

I called him. A

Approximately what time did you call him? Q

9:05, 10 after.

That morning? Q

Yes.

As a result of that conversation, sir, what if anything did you learn about this union meeting you were to attend?

The union had met with him and it had already been resolved.

Was Mr. Gerbasic there without you? Q

No.

Mr. Hillis was there?

Yes, Dir.

MR. LEVIN-EPSTEIN: No further questions.

## CROSS EXAMINATION

### BY MR. WASHOR:

Do you keep a diary? Q

No. I don't.

Have an independent recollection of when union meetings occurred any union meeting occurred prior to October 23, 1975, sir?

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MR. LEVIN-EPSTEIN: Objection.

THE COURT: Overruled.

THE WITNESS: Pardon?

Do you have an independent recollection of the date of the prior meeting to October 23, 1975?

The day before.

The 22nd? Q

Sure.

What about the one after the 23rd; was there one after?

> The day after or when do you mean, anytime? A

Immediately after the 23rd, next time? Q

I don't remember. A

Do you know a gentleman by the name of Elmore Q

Clinton?

A Yes.

Who is he?

Union representative.

Do you know what his function is? Q

He represents an area director or something like

that.

By the way, the meetings at the union, did you attend, they take place various times during the day?

Anytime. A

Q That is during the day shift am 1 correct, talk-ing about the day shift?

A Yes. Anytime during the day shift, right.

Q Is there any specified time it has to take place?

A No.

Q Anytime am I correct?

A Yes.

Any notation, memorandum of any form when the meeting that was scheduled for the 23rd of October 1975 was to take place?

A Was no time, sir.

Q As far as you knew?

A As far as I knew.

When there is a discussion between union representatives relative to how they would present grievances to management, are you present?

A Sometimes, yes.

Q When they discuss the manner of your case, you are not present, am I correct?

A Correct.

Those meetings would take place between the union representative and union officials in the absence of management, am I correct?

A I think so.

## Hudson/Cross

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Q Would it be fair to say you are a representative of management adverse to the union?

A Yes.

Q By the way, there was no meeting that day?

A I was informed there was one prior to my arriving.

Q You don't know what time?

A It took place early in the morning, 8 o'clock in the morning I have no idea.

Q You don't know who was present?

A No. I don't other than my boss.

Q Do you know whether Gerbasio was present or not?

A i was told he wasn't.

Q You don't know where he was at that time, am I correct?

A No. I don't.

Q Do you know whether or not he was advised as to what time the meeting was to take place?

MR. LEVIN-EPSTEIN: I will object to the form of the question.

THE COURT: Overruled, if he knows.

Q Do you know what time or whether or not Gerbasio was advised as to what time the meeting was to take place?

A No. He wasn't.

Q Do you know if le had a meeting between himself

1 2 and one Elmer Clinton that day? 3 No. I don't. 4 Related to union business? 5 No. I don't. Q Did you receive any phone calls from Mr. Clinton 6 7 on that day? 8 A I believe I did, yes. 9 Q Did you receive phone calls from Mr. Clinton in reference to Mr. Gerbasio and his whereabouts? 10 11 Yes. Q Would it be fair to say that phone call occurred 12 13 around 11 A.M. in the morning? 14

MR. LEVIN-EPSTEIN: I'll object, hearsay.

THE COURT: He's asked whether he got a phone call from a Mr. Clinton about 11 o'clock he may answer.

You don't recall?

What time, no.

MR. WASHOR: I have no further questions.

MR. SCHACHER: I have no questions Your Honor.

MR. LEVIN-EPSTEIN: May the witness be ex-

cused.

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Government has no questions on redirect. Your Honor, at this time the government rests its case in chief.

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unless it's asked for.

THE COURT: Nr. Schacher will object and that ends it.

On page 10 year remember we were discussing the consent point, I am afraid I must make life additionally miserable for the defendants in the case by saying I have concluded the only way to handle it correctly is to simply delete the last sentence on the page. I think it's clear butthe rest of it in because really what we would be talking about would be an affirmative consent, as long as they have never seen it, he understands. I think as long as they have never seen it they will not react to it being stricken out.

(Whereupon the following was held in open court.)

COURT's CHARGE

THE COURT: Members of the jury:

You have heard the evidence in the case and the arguments of counsel and now must receive the instructions on the law that governs the case.

You, the jurors, are the sole judges of the facts.

You must, however, follow the law as given to you in

these instructions and apply it to the facts as you find

them from the evidence before you. You are not free,

nor am I, to substitute our private judgment as to what

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the law should be for what the law in fact is.

You have been sworn as jurors well and truly to try this case and to render a true verdict. You must therefore exclude from your deliberations all bias and prejudice. You must not permit yourselves to be governed by sympathy or any other consideration not founded in the evidence and these instructions on the law.

The issue of fact to be tried are those made by the indictment and the defendants pleas of, "not guilty." Bear in mind that the indictment is the formal method of accusing a person of a crime; it is not itself evidence that a defendant committed the crime charged, nor is the fact that the indictment was found any evidence of guilt.

Count one of the indictment is drawn under Section 659 of Title 18, United States Code, which provides, so far as we are concerned with it that, "whoever embezzles, steals, or unlawfully takes -- with intent to convert to his own use any goods moving as, or which constitute a foreign shipment of freight, shall be fined or imprisoned or both. Count one reads as follows.

On or about the 21st day of October 1975 within the Eastern District of New York the defendant Mario J. DeLucia and the defendant Angelo Gerbasio with intent to

convert to their own use, did wilfully and knowedgeably embezzle, steal and unlawfully take from cargo building 67, John F. Kennedy International Airport Queens New York a quantity of women's coats having a value in excess of \$100 which goods were moving as and constituting a foreign shipment of freight from Taiwan, Republic of China to New York, New York. The cases of two defendants are before you for consideration on two counts.

against him must be considered separately on the basis of the evidence introduced before you as it affects that defendant on that count. You will be asked to return separate verdicts on each count as to each defendant, and in so much as your verdict on each count as to each defendant, and in so much as your verdict on each count as to each defendant must depend on the state of the evidence relevant to that count as it affects that defendant your verdict as to one defendant may differ as between the two counts. And your verdict may differ as to each count as between the two defendants. To emphasize this I will in general speak of, "the defendant" in these instructions.

The essential elements of count one, all of which
the government must prove beyond a reasonable doubt or
else you must acquit the defendant whose case you are

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considering on count one are the following:

First, that the women's coats in question were moving as constituted a foreign shipment of freight at the time they were stored in cargo building 67 at John F. Kennedy International Airport;

Second, that the defendant actively participated in taking the women's coats on October 23, 1975;

Third that the women's coats were taken from cargo building 67 without the consent of their owner or the authorities in charge of cargo building 67:

Fourth, the defendants' participation in the taking of the women's coats was a conscious and intentional participation carried out with the knowledge that he was taking part in stealing for his own use, goods belonging to others.

ential elements beyond a reasonable doubt, you will find the defendants guilty on count one. If the government fails to prove any one, or more, or all of the essential elements of count one, then you must acquit the defendant on count one.

The first essential element requires proof that the women's coats were part of a foreign shipment of freight. The statute provides that the way bill, or the

shipping document shall be evidence from which you may find the place from which, and the place to which a shipment was made.

ment of freight, if they are in the hands of an airline or other common carrier in the ordinary course of transportation from a shipper in a foreign country to a consignee in a state of the United States. Stops in the course of transportation at a carrier terminal such as a cargo building for breakup and transfer of shipment for local delivery do not bring the foreign shipment of freight to an end. The foreign movement of the shipment of freight normally ends only when the ultimate carrier makes delivery of the goods to the consignee. It is for you to say from the evidence whether the shipment was still moving as part of a foreign shipment of freight at the time when the coats were in cargo building 67 at JFK Airport.

The government does not have to prove that the defendant knew that the shipment was a foreign shipment.

The second essential element is that the defendants actively participated in the taking of the coats.

Whereas in the present case two persons are charged together with the commission of an offense, the govern-

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ment is not required to prove that one of the defendants alone did all of the things required to make out the offense. On the contrary, under the law as embodied in Section 2 of Title 18 of the United States Code, all those who aid and abet the commission of an offense, or cause an act to be done which if directly performed would be an offense are treated as equally guilty of the crime, that is, they are punishable as principal offenders. Hence, if a person voluntarily unites his efforts with one or more others to bring about the commission of a crime, he's equally guilty with the others and they with him, provided he is conscious of the nature of the criminal venture and intentionally associates himself in its furtherance and actively participates in bringing about the accomplishment of the criminal venture. You must determine from all of the evidence whether you are satisfied beyond a reasonable doubt that the defendants participated in the taking of women's coats from cargo building 67.

However, a person is not a guilty participant if he is merely present during the commission of a crime, even though the person is aware that a crime is being committed and does nothing to stop it, provided he does not in any way participate in or help in the commission

of the crime knowing that he is helping to commit it.

were taken without the consent of their owner or the authorities in charge of cargo building 67. It would not be consent if such persons simply stored the coats at such a place and in such a manner that their taking was made possible, or was merely facilitated. Nor is it consent if the Pan-Am representatives, believing that a theft was to be attempted, did not prevent it, but rather advised the FBI of what Pan-Am had been told, and Pan-Am's agent Godoy then kept the FBI advised of what he observed in warehouse 67.

The fourth essential element is that the defendant's participation was conscious and intentional and
was undertaken with the knowledge that he was taking
part in stealing for his own use, goods belonging to
others. The government is not required to prove a defendant's knowledge by direct evidence such as by proving the defendant's own words fully expressing his
thoughts. But, the government must prove for the and circumstances from which you are able to and do infer the
defendant's knowledge and his intention beyond a reasonable doubt.

If it is shown that a defendant, alone or with

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another, is in possession of goods that have been recently stolen, then, unless an innocent explanation of that possession appears from the evidence, you may although you are not required to, infer and conclude that the defendant knew that the goods were stolen goods. In the present case, as to Defendant Gerbasio, you must first be satisfied from the evidence that he knew the cartons were in the Pan-Am truck when he was riding in the truck and assisted in gassing it. Defendant Gerbasio's presence in the passenger's seat of the Pan-Am truck is not enough, standing alone, to authorize you to infer and conclude that he knew the cartons were in the truck. (Clunn, 4th 57 Fed 2d 1273, 1275) But, if you conclude from all the evidence in the case and from the circumstances that he did know that the cartons were in the truck, then you may find the defendant Gerbasio had possession of the cartons, along with the defendant DeLucia. In this connection, bear in mind that one who, in circumstances that should have alerted him, deliberately fails to inquire or closes his eyes to the obvious for the very purpose of avoiding learning the facts, may be treated as if he did know what he would readily have learned had he inquired or made a simple observation. Let me repeat the essential elements of

count one.

The essential elements of count one, all of which the government must prove beyond a reasonable doubt or else you must acquit the defendant whose case you are considering on count one are the following:

FIRST, the women's coats in question were moving as, or constituted a foreign shipment of freight at the time they were stored in cargo building 67 at John F. Kennedy International Airport:

SECOND, that the defendant actively participated in taking the women's coats on October 23, 1975:

THIRD, that the women's coats were taken from cargo building 67 without the consent of their owner or the authorities in charge of cargo building 67:

FOURTH, that the defendant'sparticipation in the taking of the women's coats was a conscious and intentional participation carried out with the knowledge that he was taking part in stealing for his own use goods belonging to others.

If the government proves each of these four essential elements beyond a reasonable doubt, you will find the defendant s guilty on count one. If the government fails to prove any one, or more, or all of the essential elements of count one, then you must acquit the

defendant on count one.

Count two charges the defendants with conspiring with each other to commit the offense of count one, that is, to take women's coats in violation of the law, and further, to commit the crime of receiving those coats and havingthem in their possession while knowing they were stolen. The count is drawn under Title 18, United States Code Section 371, which, so far as we are concerned with it, provides,

"If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined or imprisoned or both.

Count two reads as follows:

On or about and between the 20th day of October 1975 and the 23rd day of October 1975, both dates being approximate and inclusive within the eastern district of New York, the defendant Mario J. DeLucia and the defendant Angelo Gerbasio did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18 United States Code Section 659, by one, the conspiring to unlawfully take from cargo building 67 at the John F. Kennedy International Airport Queens New York a quantity of women's coats having in

value in excess of \$100, which goods were having as and instituting a foreign shipment of freight from Taiwan, Republic of China to New York, New York and further to unlawfully receive and have in their possession the said coats, the information said defendants knowing the same to have been stolen. In furtherance unlawful conspiracy and for the purpose of effecting the objectives thereof within the eastern district of New York, the defendant Mario J. DeLucia and the defendant Angelo Gerbasio at this time committed among other things the following overt act.

On or about October 23, 1975 within the eastern district of New York the defendant Mario J. DeLucia and the defendant Angelo Gerbasio traveled together in a motor truck from John F. Kennedy International Airport Queens New York, to Staten Island New York.

Now, conspiracy is an offense separate from the commission of an offense that may have been committed pursuant to the conspiracy. That is because the formation of a conspiracy, of a partnership in criminal purpose, is in and of itself pronounced a crime by the statute. A conspiracy is a combination of agreement of two or more persons to accomplish an unlawful purpose by their concerted action. The essence of the charge

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of conspiracy is first, an understanding among two or more persons that they will act together to accomplish a common objective which they know is unlawful, plus, second, the doing of an overt act in furtherance of the conspiracy. The understanding does not have to be a formal or expressed one. The understanding essential to the finding of a conspiracy exists if by whatever means, pact or outspoken, the alleged member of the alleged conspiracy have arranged to unite their several efforts to accomplish a common object that they know is unlawful.

One may become a member of a conspiracy without having full knowledge of all of the details of the conspiracy and without knowing the identities of the other conspirators. But, a person who, having no knowledge of a corspiracy, acts in a way which furthers some object of the conspiracy, does not thereby become a conspirator. Before you may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was formed, and that the defendant, or other person who is claimed to have become a member, helped to carry the plan forward knowing the principal terms of the plan and that it was unlawful man having

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the intent to advance or further some object of the conspiracy.

The overt act required to be proved may be an act which, considered by itself, is an innocent act.

The overt act must be one of the overt acts alleged in the indictment and it must be committed by one of the conspirators with the conscious purpose of furthering the achievement of the objective of the conspiracy.

One who is a conspirator is answerable not only for his own acts but also for the acts of his co-conspirators done in furtherance of the comspiracy.

The essential elements of count two, all of which the government must establish beyond a reasonable doubt or else must acquit the defendant whose case you are considering are the following:

FIRST, that the conspiracy to steal or to have in their possession the women's coats described in the indictment was formed;

SECOND, that the defendant whose case you are considering became a member of the conspiracy knowing that the conspiracy was one to steal goods moving as, or constituting part of a foreign shipment of freight or to receive and possess the stolen goods; and

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THIRD, that for the purpose of carrying forward the conspiracy, the defendants traveled together by truck from JFK Airport to Staten Island.

If the government proves each essential element of the count two beyond a reasonable doubt, you will find the defendant whose case you are considering guilty on count two. If the government fails to prove any one or more of the essential elements of count two beyond a reasonable doubt, you must acquit the defendant whose case you are considering on count two.

It is not for you to say upon all the evidence whether or not you are satisfied that the government has proved the conspiracy alleged in the indi ctment as against each of the defendants considering the case of each defendant separately. Your first task is to determine what sequence of events you find that the evidence establishes and then to determine whether there was a plan or program agreed to by the two defendants and whether it embraced both the theft and the receipt and possession of the woman's coats.

In weighing the evidence on each count you may come to consider the statements that were made after arrest and you will recognize that each defendant's statement, if true, would tend to exclude him of the

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exculpatory statement was false, then you may, but you are not required to, consider it evidence of guilt, for you may consider that one who was innocent would not have any occasion to tell an untruth about his connection with the matter. The term reasonable doubt is used repeatedly in these instructions.

proof beyond a reasonable doubt is not proof to an absolute certainty. Few things in life can be so proved. Proof beyond a reasonable doubt is such proof as you would be willing to rely and act upon in the most important of your own affairs, if after carefully weighing all the evidence you have an abiding conviction of the truth of the charge such that you feel conscientiously bound to act upon it, then you would be free from reasonable doubt. If, however, after weighing all the evidence, you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, such a doubt would be a reasonable doubt.

That does not mean that each bit of the government's evidence must be found by you to be true beyond
a reasonable doubt. It means rather that in sum total
the government's evidence must satisfy you beyond a

reasonable doubt as to each element of the crime charged, or you must acquit.

A reasonable doubt may arise not only from the evidence produced, but also from the lack of evidence. since the burden of proof is always on the government, a defendant has the right to rely on the failure of the government fo prove any essential elements of the charge. A defendant may rely too on evidence brought out on his cross examination of witnesses called by the government. The law does not impose on a defendant the burden or duty of producing any evidence.

Under our law a defendant has a constitutional right to remain silent. No inference unfavorable to the defendant can be drawn from that fact. Your deliberations accordingly must exclude consideration of, or reference to the matter and it must concern itself solely with the evidence before you.

A defendant is presumed to be innocent and that presumption accompanies him throughout the trial. It continues unless you are satisfied on all the evidence that the government has proved defendant's guilt beyond a reasonable doubt.

I will not summarize the evidence.

You have heard ten witnesses, exhibits have been

received in evidence. I have said that you must decide the case on the evidence.

The evidence is the testimony of these witnesses, the exhibits received in evidence and the goods which have been stipulated.

Statements and arguments of counsel and answers stricken from the record are not evidence.

The evidence includes, of course, what is brought out on cross examination as well as what is testified under direct examination.

Your verdict must be based on the evidence. But, in your consideration of the evidence you are not limited to the bare words of the witnesses and the bald facts that you find have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

You are the sole judges of the credibility of the witnesses.

The motives and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the

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verdict might affect him.

You may consider the appearance and manner of each witness on the witness stand, the witness's apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically credible or seems to you in whole or part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effects of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood.

If you find a witness has been mistaken or untruthful, in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature and extent of the defects that you find in it.

Evidence that an earlier time a witness made a statement inconsistent with or contradictory of that witness's testimony here in your presence justifies you in rejecting the testimony given before you on that point but does not require you to reject the testimony. You must decide in the light of the inconsistency and

all the other factors bearing on the credibiltiy of the testimony whether you do, or do not accept it as true. You do not, however, take the earlier statement as establishing the true facts; rather, you treat it as at most nullifying the testimony given in court here.

If, however, a witness adopts as true a statement he made out of court at an earlier time, then you may treat that out of court statement as the witness's evidence.

If you conclude that a witness has knowingly testified falsely about any material matter, you have a right to distrust that witness, testimony in other particulars. You may reject all the witness's testimony or give it or parts of it the credence you think it deserves.

I have sought not to comment from the evidence or to give any impression as to my own view, if I have one, of the relative weight of the evidence. If I have done so, however, you may disregard it entirely for you are the sole judges of the facts.

jections have been made and rulings on evidence given.

Draw no inferences from the comparative frequency of objections of one or the other side, or form the compara-

ative record in having objections sustained. Where an objection to a question has been sustained, disregard the question and draw no inference from its wording about the answer that might have been given. Where an objection is overruled, evidence then received has no special weight just because unsuccessfully objected to.

Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching agreement if you can do so without doing violence to individual judgment. Each of your st decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. Your task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The form of your verdict, which must be given separately on each count for each defendant, is simple. Your verdict must be either guilty or not guilty, it

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defendants.

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must be given separately for each count as to each defendant, and it must be a unanimous verdict on each count as to each defendant. Your verdict need not be the same on all counts as to any one defendant, nor need the verdict on any count be the same as to all

Your verdict on each count will be delivered orally here in open court by your foreman in response to questions which the deputy clerk of court will address to her.

You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

When you have reached a verdict and are ready to report, simply advise the marshall that you have reached a verdict without disclosing orally or in writing what your verdict is.

Your verdict must not be disclosed to anyone before you deliver it orally in the court room in response to the questions of the clerk of the court.

If you wish to communicate with the Court do so in writing, using the foreman, juror number one as your intermediary and spokesman. Notify the marshall when you have any such communication.

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There will now be a short recess during which counsel will review the charge with me to make certain that nothing has been omitted or misspoken. Then you will retire to the jury room to deliberate your verdict. If you wish, a form can be supplied to you so that no confusion as to the form of verdict arises.

Mr. Delpuca and Mr. Krumlich, bring your hats and coats with you because at that point, if nothing happens between now and then you will be discharged from the service on the jury. Please do not start on your deliberations since Mr. Delpuca and Mr. Krumlich are still with you and they will be off the jury in just a minute.

(Whereupon the following was held outside the presence of the jury.)

MR. WASHOR: For the record, can I take exception to those portions of the charge heretofore excepted to at the prior discussion without reiterating them in their entirety?

THE COURT: The one we red-flagged as we went through the procedure of clearing the charge, those, right?

MR. SCHACHER: That is correct, Your Honor.

Have you seen this jury memorandum THE COURT:

form?

MR. LEVIN-EPSTEIN: I haven't but I think it's fine to me.

(Whereupon the trial resumed in open court.)

THE COURT: Now, there will be no additional instructions members of the jury, at this point the marshalls will be sworn, take you into custody until you reach a verdict.

(Whereupon the marshalls were sworn by the clerk of the court.)

THE COURT: Members of the jury, the marshalls will be taking you out and begin your deliberations, let me say to you we do not continue deliberations far into the night so you don't have to worry about getting bad dinner tonight. Or having to sleep in the St. George Hotel or equal, but at 5:30 will separate under instructions to you if you have not then reached a verdict and resume deliberation at 10 o'clock tomorrow morning. So, we think that is a great deal better than crowding, attempting to crowd you and perhaps sacrifice deliberation to the wish to avoid inconvenience.

(Whereupon the following was held outside the presence of the jury.)

MR. WASHOR: We consent to the swearing of any

relief marshalls without the resuming of all parties and the jury to the court.

THE COURT: And the practice which referred to messages is if the jurors have messages they give them to the marshall, the marshall shows them to me, if they're innocent then I authorize the marshall to make the phone call or whatever it is and he does so. The jurors of course are not allowed to talk on the telephone.

MR. WASHOR: No objection to Your Honor screening the innocence of the messages of the jury.

MR. SCHACHER: What can I say.

(After a short recess.)

MR. LEVIN-EPSTEIN: Your Honor, I think Mr. Washor and I are in agreement of what Court Exhibit One is, but I think Mr. Schacher takes issue.

MR. SCHACHER: What the interpretation is that they want.

MR. LEVIN-EPSTEIN: I think Mr. Washor agrees with me the essential elements they're speaking of is the four elements and the count.

THE COURT: I think they mean page ?.

MR. SCHACHER: If they want it I think it's page 7.

THE COURT: Should I read it to them or what?

MR. WASHOR: We can eliminate any kind of spec-

ulation, we can ask them when they come out.

(Whereupon the following was held in open court.)

THE COURT: Members of the jury we have your note and I infer from that that what you would like is to hear reread the essential elements of count one that is the one that had the four points in it, count two had only three points in it. Are those the two things you wanted, or just -- let me read them to you and if you wish to have copies of them then I can consider that with counsel, give them to you in the morning, but I don't know we can get them copied that fast.

The essential elements of count one all of which the government must prove beyond a reasonable doubt or else you must acquit the defendant whose case you are considering on count one are the following:

FIRST, that the women's coats in question were moving as or constituted a foreign shipment of freight at the time they were stored in cargo building 67 at John F. Kennedy International Airport;

SECOND, that the defendants actively participated in taking the women's coats on October 23, 1975;

HIRD, that the women's coats were taken from

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cargo building 67 without the consent of their owner or the authorities in charge of cargo building 67; and

FOURTH, that the defendants participation in the taking of the women's coats was a conscious and intentional participation carried out with the knowledge that he was taking part in stealing for his own use goods belonging to others.

If the government proves each of these four essential elements beyond a reasonable doubt, you will find the defendants guilty on count one. If the government fails to prove any one, or more, or all of the essent al elements of count one, then you must acquit the defendants on count one.

On count two the conspiracy count, and the essential elements of count two all of which the government must establish beyond a reasonable doubt or else you must acquit the defendant whose case you are considering are the following:

FIRST, that the conspiracy to steal or to have in their possession the women's coats described in the indictment was formed;

SECOND, that the defendant whose case you are considering became a member of the conspiracy knowing that the conspiracy was one to steal goods moving or as

constituting part of a foreign shipment of freight, or to receive and possess the stolen goods; and

THIRD, that for the purpose of carrying forward the conspiracy, the defendants traveled together by truck from JFK Airport to Staten Island.

If the government proves each essential element of count two beyond a reasonable doubt, you will find the defendant whose case you are considering guilty on count two. If the government fails to prove any one or more of the essential elements of count two beyond a reasonable doubt, you must acquit the defendant whose case you are considering on count two.

All right, now, let's see if we can make copies of these. Probably not until tomorrow.

(Whereupon the marshal was sworn by the clerk of the court.)

THE COURT: You will be going in a few min-

(Whereupon the following was held outside the hearing of the jury.)

MR. LEVIN-EPSTEIN: I didn't realize that when the charge was first given, but I wonder whether or not the Court spoke it inadvertently on the charge on the first element of the conspiracy count when it

said that the crime must be proven in that one of the elements that the government must prove that both of the co-conspirators entered the conspiracy knowing it was a conspiracy to -- I have introduced the Fiola Decision, it's only --

MR. WASHOR: I believe later on in your charge you make the statement that they do not have to have --

THE COURT: You mean in view of Crimmins?

MR. LEVIN-EPSTEIN: And the Fiola.

THE COURT: And the later case. I haven't thought about that. No, it was definitely -- let me see what this means.

MR. LEVIN-EPSTEIN: I know that the Court instructs them on the instance of violation that the knowledge requirements to satisfy even though they might not know or may not find out the goods were traveling intersace, but merely the theft which is the law I think it's my only fault for not catching it sooner, but I would suggest that a curative be given.

THE COURT: Yes, it's wrong the way it stands, you suggest -- well, I see it's -- really the way it should read is that the conspiracy was to steal goods moving in commerce, not to defendant's become a member knowing that it was, that there was a conspiracy

to steal afoot.

MR. LEVIN-EPSTEIN: Exactly.

THE COURT: It must be a conspiracy to steal goods in moving, or else we don't get it at all. But any one member doesn't have to know that as long as it's that in fact. Right?

MR. LEVIN-EPSTEIN: I agree.

THE COURT: I have turned it upside down.

Going to be a little hard to shift gears on them.

MR. LEVIN-EPSTEIN: Perhaps this is the time to start shifting, the elements of the crime is fresh in their minds.

MR. WASHOR: I know the law and they don't have to prove knowledge in a conspiracy count. That the goods were part of an interstate shipment.

MR. SCHACHER: Don't have to prove that at all.

Your Honor, might --

MR. WASHOR: May I suggest that since it's going to be submitted to them tomorrow the Court excise out looking at the second paragraph moving as constituting part of a foreign shipment of freight. And just in the retyping of a conversation of knowing that the conspiracy is one to steal goods or to receive or possess the stolen goods.

MR. LEVIN-EPSTEIN: I would agree to that Your Honor.

THE COURT: We have to get the instituting in up above.

MR. WASHOR: The Court accept a suggestion from counsel. If you could interpolate making the words moving as or constituting part of a foreign shipment of freight. Remove it from the second element and place it in the first element after the words coats.

THE COURT: Wouldn't it be this, see if it works this is substantially what you're saying. That a conspiracy was formed to steal goods moving as or constituting part of a foreign shipment of freight or to have the possession of goods so stolen.

MR. LEVIN-EPSTEIN: Is that satisfactory to you Mr. Washor?

MR. WASHOR: Yes, it is.

MR. LEVIN-EPSTEIN: Is that satisfactory to you Mr. Schacher?'

MR. SCHACHER: I'll agree.

THE COURT: I'll have to retype with that modest change in it.

MR. LEVIN-EPSTEIN: I asked they be signed verbally of the change, there is a difference as we all

know. Let's send them home now before they start thinking.

Let's reinstruct them and send them home.

MR. SCHACHER: Tomorrow morning I think.

MR. LEVIN-EPSTEIN: I prefer they not spend the night thinking about it improperly.

THE COURT: I think they're still working on count one.

MR. WASHOR: That is a concern of mine also.

Might 't be if they have concluded it and reached a

decision a curative instruction at this time presents

quite a problem not knowing --

MR. LEVIN-EPSTEIN: Why is -- exactly why we shouldn't ask --

THE COURT: It's dangerous to instruct a jury.

MR LEVIN-EPSTEIN: Generally speaking.

THE COURT: Because you can't tell when they'll follow the instruction.

MR. LEVIN-EPSTEIN: I would ask the Court to give the correct instruction right now.

THE COURT: Two things I'll say since it is 5:30, I'll say to them I assume they have not reached a decision to either defendant in either count.

MR. WASHOR: If they acknowledge that may I ask that you instruct them in the morning.

(Whereupon the following was held in open court.)

THE COURT: Now, I assume members of the jury

you have not reached a verdict as to either defendant

on either count I take it that is right.

And before excusing you I want to read to you again the essential elements of count two because counsel directing my attention to the fact that there is, was a displaced clause in the reading. And so I want to reread it to you now just before excusing you so that I don't want to abbreviate it. The essential elements of count two all of which the government must establish beyond a reasonable doubt or else he must acquit the defendant whose case you are considering are the following:

FIRST, that a conspiracy was formed to steal goods moving as, or constituting part of the foreign shipment of freight or to have possession of goods so stolen;

SECOND, that the defendant whose case you are considering become a member of the conspiracy knowing that the conspiracy was one to steal goods or to receive and possess the stolen goods; and

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THIRD, that for the purpose of carrying forward that conspiracy the defendants traveled together by truck from JFK Airport to Staten Island. If the government has proved each essential element of count two beyond a reasonable doubt you will find the defendant whose case you are considering guilty on count two. If the government fails to prove any one or more of the essential elements of count two beyond a reasonable doubt you must acquit the defendant whose case you are considering on count two.

Now, I should say to you that in permitting juries to separate, go home, sleep in their own beds get their legs under their own dinner tables we're doing something which is relatively new in the administration of jurors in our country.

Traditionally jurors were never allowed to separate until they've reached a verdict no matter how late in the night it was, how cold it was, whether the fire had gone out or not. And as you can see that was not an ideal way to get jurors to deliberate sensibly. So, after several centuries that has been changed.

Jurors are now allowed to separate but you must bear in mind why it was that they were not allowed to separate. That is because the overwhelming importance

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of protecting the jury deliberation from any outside intrusion. You 12 people are the only people in the world who are competent to decide this case, only you have heard the evidence sworn to subject to cross examination, exhibits, that have been looked over by counsel argued about and finally qualified for admission in evidence before you. What everybody else could possibly know about this case. Only you really know this case and only you are competent to decide. Now, you and you alone are sworn to decide it and counsel have determined that you are all free of any interests on either side of the case, so that again you are alone, counsel is on one or the other side, you're not. In this purview that we have been afforded here together only you have done nothing but listen to the evidence and now are ready having heard both sides disinterstedly determine, no one else just you. So, it's important particularly when you separate new that you discuss the case with absolutely no one. Not your most trusted advisor, your spouse above all, your most trusted advisor because this is one time when he or she no matter how wise and judicious cannot halp and can only hurt.

So, it's an absolute imperative that you not discuss the case with anyone not on the jury. And when

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you do separate if any two or three of you are traveling together to Brooklyn together, do not discuss the case because just as sure as shooting someone of you will say something to one of the others that you'll never repeat and yet which may maybe very important to anyone who hears it from you decisive in their thinking or important in their thinking and the other jurors will never have heard it, you said it once, you may not repeat it. It's important that you discuss the case only when you are all together, remembering that it's the way you're temporarily body is incorporated equipped through your common deliberation to decide this case. Now, remember overnight the administration of justice is in your hands and it's most sensitive moment, it's in your trust and I know you will not betray it. Good night, see you tomorrow.

Don't check in downstairs come directly to the jury room tomorrow morning at 10 o'clock.

(Whereupon at this time a recess was held until May 11th, 1976.)

A F T E R N O O N S Z S S I O N

THE CLERK: Court Exhibit No. 2, Jury Note.

Court Exhibit 2 reads: "We have reached a

(Whereupon, the jury returned from their deliberations.)

THE COURT: We have your message, members of the jury, that you have reached a werdict. Mr. Walch, please take the verdict.

THE CLERK: Madam Forelady and ladies and gentlemen of the jury, how do you find the defendant Mario Joseph Delucia as to Count One of the indictment?

THE FORELADY: We found him guilty.

THE CLERK: How do you find the defendant

Gerbasio as to Count One, guilty or not guilty?

THE FORELADY: Guilty, sir.

THE CLERK: How do you find the defendant

Delucia as to Count Two, guilty or not guilty?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant

Gerbasio as to Count Two, guilty or not guilty?

THE FORELADY: We also found him guilty, sir.

THE CLERK: You say you find the defendant

Delucia and the defendant Gerbasio guilty of Count

One and of Count Two and so say you all.

## AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, COUNTY OF RICHMOND 95.:

deponent is not a party to the action, is over 12 years of age and resides at 286 Richmond Avenue, Laten Island, N.Y. 10302. That on the 19 day of Oct. . 1976 at No. 225 Cadman Plaza East., Bkly-n Nydeponent served the within Appendix upon U.S. Atty., East. Dist. of N.Y. the Appellee hereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me, this 19 day of Oct.. 1976

Edward Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0182945

Qualified in Richmond County

Commission Expires March 50, 1888 1978